

The University of Chicago

STATUTES OF LIMITATIONS AT ATHENS

A DISSERTATION SUBMITTED TO THE FACULTY OF
THE DIVISION OF THE HUMANITIES IN CANDIDACY
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF GREEK LANGUAGE
AND LITERATURE
1938

By
JOHN FREDRICK CHARLES

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This dissertation is a development and elaboration of a problem proposed to the writer by Professor Robert J. Bonner in a seminar on Attic Orators. My thanks are due to him for his help and advice at every stage of the work. I also wish to express my gratitude to Professor Gertrude Smith, whose suggestions were of great assistance.

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INTRODUCTION

Prothesmia (προθεσμία) is a period of time, within which or before which something is to be done.¹ In its usual Athenian legal sense it indicates that period within which legal action must be taken; in this sense it is practically equivalent to the Latin praescriptio; and it is with prothesmia in this latter sense that the present dissertation is concerned.

Prescription is twofold in its significance: from one standpoint it extinguishes the right of an allegedly injured party to bring action; from another it establishes the right of a possessor of property to its ownership. Thus, if A claims ownership of a piece of property of which B has been in possession for a number of years, the prescription extinguishes A's right to sue for the property, and at the same time guarantees B's title to it. This latter function of prescription is, therefore, a means of acquiring title to property, and is known as usucapio. The prescription which merely limits the right to bring actions is best called by its English name, the statute of limitations.

The only systematic treatment of the subject is Caillemers's Prescription à Athènes.² Caillemers's work, though, covers the subject rather inadequately, and in spite of much useful material is marred by a considerable number of errors. Lipsius' com-

¹The word is used, for example, to designate the period within which a debt must be paid. Aeschines (i. 39) speaks of the decree forbidding suits arising from wrongs at the time of the Thirty or before the archonship of Eucleides as a prothesmia. The word is used in an even broader sense in later writers: cf. Pausanias iv. 5, 10; Lucian Nigrinus 26.

²E. Caillemers, La prescription à Athènes, "Études sur les antiquités juridiques d'Athènes," Septième étude (Paris, 1869).

ments in Das Attische Recht¹ are excellent as far as they go, but he makes no attempt to deal with the matter systematically.

It is the purpose of the present treatise to study all cases known to us from the sources of temporal limitations upon the right to bring actions;² and while much of the material has been dealt with by different writers in connection with other subjects, it is hoped that some of the much-disputed questions may have been brought nearer to solution, and that it will be of use to have the institution dealt with as a whole.

¹J. H. Lipsius, Das Attische Recht und Rechtsverfahren (Leipzig, 1905-15).

²This, of course, does not include such suits as the δίκαι ἐμμενέοι, which had to be tried within one month. The obligation there was upon the magistrate to bring the suit to trial within a month of the filing of the plaint, not upon the plaintiff to file within a month of the injury or default. Lipsius, p. 901.

CHAPTER I

THE STATUTE OF LIMITATIONS

Private Suits

The general prothesmia.-- That the general prothesmia was for five years is to be assumed from Demosthenes' statement¹ in the speech he wrote for Phormio's paragraphé against the δίκη ἀφορμῆς of Apollodorus. He says:

This is the way then that the law clearly limits the time. But Apollodorus here, though more than twenty years have gone by, asks you to consider his sycophancy of more importance than the laws by which you have sworn to judge. And yet it is proper for you to pay attention to all the laws, and not least of all to this one. For it seems to me that Solon² enacted this law for no other reason than that you should not be the prey of sycophants. For he considered that five years were sufficient for those who had suffered injury to get satisfaction; whereas he thought that time would be the best test against those whose complaints were trumped up. And since he realized that it is impossible for the contracting parties and witnesses to live forever, he enacted this law so that it should be a witness for those deprived of witnesses.³

Apollodorus' suit is, of course, a δίκη ἀφορμῆς,⁴ but we are by no means justified in assuming that the prothesmia described above was restricted to the δίκη ἀφορμῆς alone. In the first place the language is quite general and limits the prothesmia to no specific type of case. In the second place, it is well known that the Athenian law tended to allow a number of different

¹Demosthenes xxxvi. 26-27.

²This is the only evidence as to the date of the introduction of prothesmia. Though the attribution to Solon is not to be taken too seriously, it is probable that the νόμος προθεσμίας was embodied in the first written code of Athens.

³This is the locus classicus on prothesmia and is therefore quoted in full. It is cited in Harpocration and Photius s.v.

⁴Hypothesis ad Demosthenes xxxvi, 2.

suits all applicable to the same type of case.¹ There are a great many suits used to recover money which are frequently interchangeable: δίκη ἀφορμῆς, ἀργυρίου, χρέως, and under many circumstances δίκη βλάβης and δίκη συνθήκων παραβίασεως. Now it is reasonable that if a five year prothesmia limited suits to recover capital (δίκη ἀφορμῆς), a δίκη ἀργυρίου or any other suit used for the same purpose would be similarly limited. The prothesmia would not vary with the individual suit, but with the type of case.² We may justly assume then that suits to recover money were subject to a five year limitation.

But suits for debt are not the only ones we find with this limitation. The suit against guardians was limited to five years,³ as was that against the heirs of the κληρονόμος.⁴ From these instances the five year prothesmia seems common enough to justify us in concluding that it was the regular limitation in all private suits concerning which we have no statement to the contrary or no definite reason for assuming otherwise.

The prothesmia in a suit to recover a debt, would of course, run not from the time of the agreement, but from the time of the default. Default would be constituted (1) by the debtor failing to pay within the time agreed upon; (2) by failure to pay on the demand of the creditor, in case no time had been agreed on.

In Apollodorus vs. Timotheus,⁵ the loan which was made to the latter by Apollodorus' father, Pasion, seems to have been in the nature of a friendly loan with no definite stipulation as to

¹Demosthenes xxii. 25-28. Cf. Lipsius, pp. 265-6.

²Lipsius, p. 852 n. 20.

³Cf. pp. 7-8 infra.

⁴Cf. pp. 55 ff. infra.

⁵Demosthenes xlix.

the time for repayment, but rather an understanding that it would be paid when (and if) Timotheus earned the money and returned from his expedition with the King of Persia.¹ Timotheus left Athens in 372,² and the suit was tried in 359. No prothesmia was effective here because there was no default until Timotheus had returned and failed to pay on demand, and Timotheus had just returned. Without overstraining the argumentum ex silentio, we may suppose that if any claim to prothesmia had been made, Apollodorus would have had to deal with it in his speech.

In Callippus vs. Apollodorus, a δίκη ἀργυρίου, the trial takes place a good many years after the supposed offense. The facts were: a certain Lycon of Heraclea had left a sum of money with the banker Pasion stipulating that if he failed to return, the money was to go to Cephisiades. Lycon died and the money was given to Cephisiades in spite of the protest of a certain Callippus, who claimed that the money should be given him as he was proxenus for all the Heracleites. Three years later³ Callippus brought a δίκη βλάβης against Pasion for the amount concerned. Before the case was decided Pasion died. Callippus then brought a δίκη ἀργυρίου against Apollodorus, Pasion's son. The prothesmia was suspended by the introduction of the original suit⁴ which took place within the required five years. Until judgment had been given the case was still open and no prothesmia applied, even though a second suit had been brought in place of the one which naturally lapsed on the death of Pasion. If any had applied here

¹Loc. cit. 2: οὔτε γὰρ ἐπ' ἐνεχέρῳ οὔτε μετὰ μαρτύρων ἔδωκε. σωθέντος δὲ ἐπὶ τούτῳ ἐγίγνετο ὅπῃτε βοδλοῖτο εὐπορήσας ἡμῖν ἀποδοῦναι.

²Ibid. 28: ἐπ' Ἀστείου ἄρχοντος.

³Demosthenes lli. 8, 13. Cf. also πέρυσι in 30.

⁴Cf. pp. 63-66 infra.

we may be sure that it would have been mentioned at least by the shifty and litigious Apollodorus.

In Callicles vs. the son of Teisias, the trial took place more than twenty-five years after the building of the wall which gave rise to the suit,¹ but the damage complained of was not the building of the wall itself, but the flood caused by the presence of the wall, and this was quite recent.²

In one of the lexicographers³ it is stated that the δίκη αἰκείας had to be brought to court within four days so that the jurors might see the marks of the blows and judge for themselves.⁴ This statement does not square with the procedure in Ariston vs. Conon.⁵ The facts were: Conon, together with his son and some friends, set upon Ariston, a sober Athenian citizen, beat him and left him for dead. For a long time the physicians despaired of Ariston's life;⁶ upon his recovery he brought a δίκη αἰκείας against Conon, but the suit came to court at least a year after the offense.⁷ This directly contradicts the statement of the lexicographer.

Now at the time of Ariston vs. Conon, in the 350's, the δίκη αἰκείας belonged to the court of the Forty, as is seen from the fact that it was arbitrated.⁸ But Aristotle describes it as

¹Demosthenes lv. 4. ²Ibid. 23-27.

³Lex. Seguer. v. 360. 23: αἰκία· εἶδος δίκης ἐπὶ πληγαῖς εἰσῆγето δεῖντος ἡμέρων τεσσάρων, πρίν ἢ τὰ ἴχνη τῶν πληγῶν ἀφανισθῆναι.

⁴εἰσῆγето cannot be interpreted "introduced," for the object of the provision was to get the case before the court while the wounds were still visible; which would be effected by a limitation on the time of trying a suit, not that of introducing it.

⁵Demosthenes liv. ⁶Ibid. 1. ⁷Ibid. 3, 7.

⁸Demosthenes xlvii. 5, 6. Only suits in the jurisdiction of the Forty were arbitrated. R. J. Bonner and Gertrude Smith, The Administration of Justice from Homer to Aristotle, Vol. II (Chicago, 1938), pp. 102 ff.

a δίκη ἔμμηνος at the time he wrote (ca. 335) and therefore under the jurisdiction of the Eisagogeis.¹ It is possible that the four day period is a lexicographer's misunderstanding of ἔμμηνος; otherwise it must be entirely incorrect.

There was naturally no prothesmia in debts to the state treasury.² If one failed to pay his debt by the ninth prytany, it was doubled, and the Poletai were authorized to sell his property.³ The debtor then became ἄτιμος (in case the sale of his property did not fulfill the debt), and the atimia was inherited and remained with his descendants until the debt was paid in full.⁴ No prothesmia ever protected the public debtor or his heirs.

The nature of a prothesmia mentioned in an Athenian decree regulating the government of a colony of cleruchs in Histiaea (446/5)⁵ cannot be ascertained. From the fact that it applies to βιαίων καὶ ἀδικημάτων, one might assume that the officials were to apply the usual prothesmia in cases as in Athens.

Prothesmia in suits arising from the Guardianship.-- A guardian⁶ was responsible for the administration of his ward's estate, and was held strictly accountable for his acts. Any misdeeds might be subject to prosecution of two kinds: (1) during the minority of the ward, anyone who wished (ὁ βουλόμενος) might bring suit against the guardian by means of γραφή ὀρφάνου καὶ

¹Aristotle Ath. Pol. lii. 2. ²Caillemer, pp. 11-12.

³Ath. Pol. xlvi. 1; Suidas, Photius s.v. πωλητής.

⁴Demosthenes xxii. 33; xxiv. 200-201. In Demosthenes xxv. 38, 42, Aristogeiton is still considered ἄτιμος for debt after seven years have elapsed. Demosthenes lviii. 17.

⁵IG (ed. min.) 41, line 9.

⁶κέρυς is the general word for guardian, whether of a minor or an unmarried girl. ἐπίτροπος is used only of the guardian of a minor.

σεως,¹ γραφή οἴκου ὀρφανικοῦ κακώσεως or φάσις ὀρφανικοῦ οἴκου.²
 (2) The orphan himself, after he had reached his majority and examined his guardian's accounts,³ might take action against the latter by a δίκη ἐπιτροπῆς.

We have no information as to any prothesmia in the graphai against guardians. But since they were apparently designed for the protection of the ward at a time when he was legally incompetent to protect himself, and since this incapacity would end when he had reached his majority, it is probable that these suits were limited to the time preceding the δοκιμασία of the ward.⁴

As for the δίκη ἐπιτροπῆς⁵ and allied suits, the prothesmia was for five years⁶ dating from the orphan's majority, as is shown in the following passage of Demosthenes:

. . . τὸν νόμον εἰπεῖν ὃς διαρρήδην λέγει, ἐὰν πέντ' ἔτη παρέλθῃ καὶ μὴ δικάσωνται, μήκετ' εἶναι τοῖς ὀρφάνοις δίκην περὶ τῶν ἐκ τῆς ἐπιτροπῆς ἐγκλημάτων.⁷

It is to be noted that this prothesmia is not confined to the δίκη ἐπιτροπῆς but applies to all suits brought by wards against their guardians.

It is not definitely stated that the prothesmia runs

¹Aristotle Ath. Pol. lvi. 6.

²Former: Ath. Pol. lvi. 6; latter Demosthenes xxxviii. 23, brought for failure to rent an orphan's property. Cf. Lipsius, pp. 310-11.

³Demosthenes xxxvi. 20; xxxviii. 15.

⁴For general discussion of graphai, cf. pp. 20-23 infra.

⁵The δίκη ἐπιτροπῆς was apparently under the jurisdiction of the Forty: Bonner and Smith, II, 102 ff.; A. W. Gomme, "Two Problems of Athenian Citizenship Law," CP, XXIX (1934), 127; Aubrey Diller, "The Decree of Demophilus," TAPA, LXIII (1932), 200. Lipsius (p. 533 n. 61) believes that it belonged to the Archon, basing his opinion on the general supervision of orphans in Ath. Pol. lvi. 6-7.

⁶Similar provision, Plato Legg. 928 C. Caillemer, pp. 12-13.

⁷Demosthenes xxxviii. 17.

from the majority of the orphan, but there is no other time at which it could logically begin. The suit was a *diké* and therefore could not be brought by ὁ βουλόμενος or anyone other than the interested party; furthermore in the majority of cases, the ward would be in no position to know how his estate had been managed until he had examined the accounts. Therefore the *prothesmia* could not start at any date prior to the *dokimasia* and there is no later date which would suit the purpose.¹

A problem, however, arises in *The Sons of Aristaichmus vs. Nausimachus and Xenopeithes*.² The history of the case seems to be as follows: Aristaichmus was the guardian of Nausimachus and Xenopeithes, the sons of his brother Nausicrates.³ The wards, after reaching their majority, brought a *δίκη ἐπιτροπῆς* against Aristaichmus which the latter settled out of court⁴ eight years after the orphans had passed their *dokimasia*,⁵ agreeing to pay a

¹According to Aristotle *Ath. Pol.* xlii. 5, those who had just passed their *dokimasia* spent the next two years in military service and could not participate in litigation. The institution in this form probably dates from after Chaeronea, however. After that time it is barely possible that the *prothesmia* might have dated from the end of the ephebic period.

²Demosthenes xxxviii.

³That Nausicrates was the father of the two orphans is not definitely stated, but seems indicated by the statement (*ibid.* 12) that Fermonax had borrowed one hundred staters from Nausicrates, a debt which later came due to the orphans; and the mention of Nausicrates (7) as having left the estate.

⁴*Ibid.* 3, 10, 20.

⁵The present suit takes place fourteen years after release and discharge had been given Aristaichmus, twenty-two after the orphans had reached their majority (6). The latter figure depends on the reading *ἐγγραμμενοι*: it is so read by Blass, Butcher, and Dareste (R. Dareste, *Les plaidoyers civils de Demosthenes traduits en français avec arguments et notes* [Paris, 1875], I, 106, n. 2). C. R. Kennedy, *The Orations of Demosthenes* (London, 1897-1902), IV, 246 and n. 1, reads *γεγραμμενοι*, but suggests that it refers to a *graphe* brought during the wards' minority. *ἐγγραμμενοι* in the hypothesis supports the common reading. If the orphans reached their majority twenty-two years before the present suit, and release was given fourteen years before, the release must have been given eight years after the orphans' majority.

sum of three talents.¹ Three or four months after this settlement² Aristaichmus died. Fourteen years after this³ Nausimachus and Xenopeithes each brought a δίκη βλάβης against each of the four heirs of Aristaichmus for thirty minae-- a total of four talents--⁴ which they said represented the one hundred staters owing to their father from Hermonax of Bosphorus. This, they claimed, was acknowledged by Aristaichmus in his account⁵ and was collected after the death of the latter by Demaretus, the guardian of the heirs of Aristaichmus;⁶ but, the orphans claimed, it was never paid to them.⁷ The sons of Aristaichmus entered a demurrer-- paragraphé--⁸ charging that the δίκη βλάβης was inadmissible (μὴ εἰσαγώγιμος) on two counts: (1) a release and discharge had been given their father by the orphans;⁹ (2) the suit violated the prothesmia.¹⁰

¹If one be concerned over the lapse of time between the dokimasia and the release, let it be remembered that the orphans had five years in which to begin a δίκη ἐπιτροπῆς, and there is no reason for assuming that they would take action immediately. Once the litigation was begun the prothesmia was suspended (pp. 63-66 *infra*). Note that though the present speaker quotes the law of prothesmia in orphans' claims as barring the present δίκη βλάβης, he makes no attempt to show that the original δίκη ἐπιτροπῆς was not perfectly regular or that the delay was at all surprising. Other examples of extended litigation: (1) Aeschines vs. Ctesiphon, seven years after the beginning of prosecution (Aeschines iii. 219, 254); (2) Demosthenes vs. Aphobus, three years after the plaintiff's majority (Demosthenes xxx. 15-16); (3) Demosthenes vs. Meidias, more than two years after offense (Demosthenes xxi. 13); (4) Mantitheus vs. Boeotus, eleven years after former's majority (Demosthenes xi. 3).

²Demosthenes xxxviii. 10. ³*Ibid.* 6. ⁴*Ibid.* 2.

⁵*Ibid.* 15. ⁶*Ibid.* 10.

⁷*Ibid.* 16. The present speaker says that their stories conflict: that they are now suing for a debt which they allege was acknowledged by Aristaichmus in his account; but that when they sued Aristaichmus in the first place, they charged that he had rendered no account. It is probable that they sued Aristaichmus for not turning in an account, and that the latter, when the settlement was made, turned in an account in which he mentioned the debt from Hermonax.

⁸*Ibid.* 1. ⁹*Ibid.* 1, 3, 4. ¹⁰*Ibid.* 17-18.

The question which naturally rises is: why were Nausimachus and Xenopeithes permitted to bring their δίκη βλάβης at all? Why did not the magistrate, by virtue of his office,¹ refuse their case on the basis of the statute of limitations? The reason is to be sought in the story of the plaintiffs which we can piece together but sketchily from the speech of their opponents. The magistrate did not have the authority to decide for himself the truth or falsehood of the allegations of the litigants. If the plaintiffs had admitted that the prothesmia applied in this case, he would have been compelled to decline the suit. But if they denied this, or claimed that the fact was invalidated by special circumstances, he had no choice but to accept the paragraphé as tendering an issue of fact and to submit it to a jury for decision. All depends on the story told by Nausimachus and Xenopeithes at the anakrisis. From the context it would seem that their story ran something like this: When Aristaichmus settled out of court, eight years after their majority, he had acknowledged the debt,² and had promised to turn it over to them; on the basis of this promise they had given him release. After his death a few months later,³ they sought to collect from his sons, again extracting a promise to pay.⁴ Fourteen years later when the promise was still unfulfilled, they brought their δίκη βλάβης against the heirs of Aristaichmus, and this suit is the subject of the present speech.⁵

¹For the power of the magistrate to validate the prothesmia on his own authority, cf. pp. 60-63 *infra*.

²Demosthenes xxxviii. 14. ³*Ibid.* 10.

⁴This point is uncertain, but some such claim may be indicated by the οὐκοῦν ἐλάχομεν, φαίεν ἂν in 18.

⁵As to what took place during these fourteen years we have no information. It may be that the debt was continually under dispute, and had just now come to actual litigation. Perhaps it was merely trumped up for the present occasion.

Whether Nausimachus and Xenopeithes are telling the truth is not for the magistrate but for the jury to decide. The facts on which the *paragraphe* is to be tried are (1) a) Defendants claim that release has been given; b) plaintiffs answer that it does not apply until the promise on which the release was based is fulfilled. (2) a) Defendants claim that the *prothesmia* has elapsed; b) plaintiffs answer that it is not applicable since their original suit was entered in time, and is not really closed yet. Nausimachus and Xenopeithes are undoubtedly lying, but that is the jury's concern.¹

Prothesmia in the *δίκη ἐγγύης*.-- In theory, at least, a surety-- *ἐγγυητής*²-- at Athens was a hostage for his principal. Thus, in case of default³ or desertion on the part of the one released from custody or under penalty, the surety was held to the same punishments or penalties as would have fallen to the lot of the principal.⁴

In case of default, breach of contract or agreement, the party which claimed injury had the right to take legal action against the surety or sureties of the defaulter by bringing a

¹Lipsius (p. 534 and n. 67) holds that the *δίκη ἐπιτροπῆς* could be brought only against the guardian himself; after his death, his heirs could be sued only by *δίκη βλάβης*; he bases this conclusion on the present speech. But a *δίκη ἐπιτροπῆς* could not be brought against the sons of Aristaichmus in the present case because that suit had already been brought against Aristaichmus himself and settled. A *δίκη ἐπιτροπῆς* could be brought at any time within the allowed five years: against the guardian if alive, against his heirs otherwise. But any suit to recover property promised as a result of a previous *δίκη ἐπιτροπῆς* could not be a repetition of the same suit (this was illegal: Demosthenes xx. 147; Pollux viii. 57); it would have to be a *δίκη βλάβης*.

²*ἐγγυητής*-- one who offered himself as surety; *ἐγγύη*-- the surety.

³For definition of default, cf. p. 4 *supra*.

⁴Andocides i. 44. Notice the willingness of Agoratus' sureties to leave Athens with him: Lysias xiii. 25. Cf also Lipsius, p. 706, n. 107.

δίκη ἐγγύης. It is to be noted that the suit could be brought against the bondsman even though the plaintiff had previously taken no legal action against the defaulter himself.¹ This is in contrast to Anglo-American practise which makes it necessary to take all possible action against the principal before proceeding against the surety.

The speaker of the pseudo-Demosthenic speech against Apaturius says: λαβέ δὴ μοι καὶ τὸν νόμον δὲ κελεβεῖ τὰς ἐγγύας ἐπετείους εἶναι.² This sentence has given rise to difficulties since writers on the subject have usually assumed that it means sureties are to be in force for one year, dating from the time of the agreement. But we have examples of sureties which are definitely stated to be for a longer period of time.³ Caillemér⁴ seeks to solve the problem by suggesting that sureties in commercial suits (δίκα, ἐμπορικαί) were for one year, all others for the usual five. But besides having no authority, this suggestion fails to explain cases like that cited in which the surety is apparently to be perpetual. Wachsmut⁵ believed that the one year prothesmia was confined to bottomry loans. But the Apaturius case was not connected with a bottomry loan.

¹In Isaeus v, Menexenus IV brought a δίκη ἐγγύης against Leochares, the surety of Dicaeogenes III, claiming that the latter had failed to keep his agreement; but no previous action had been taken against Dicaeogenes (loc. cit. 1). Cf. Lipsius, p. 712 and n. 130.

²Demosthenes xxxiii. 27.

³E.g. IG (ed. min.) 2496: surety for a lease εἰς τὸν ἅπαντα χρόνον.

⁴p. 22.

⁵W. Wachsmut, *Hellenische Alterthumskunde aus dem Gesichtspunkte des Staats* (Halle, 1844), II, 188: "Auf wie lange Zeit eine Bürgschaft gelten sollte hing von der Beschaffenheit der Sache ab; einjährige Dauer, welche zuweilen erwähnt wird, ist vielleicht nur in Bodmereiklagen, also von der Zeit der Schifffahrt zu verstehen."

The most satisfactory conclusion is that the one year prothesmia ran from the date of default, not that of the agreement. In this case the creditor would undoubtedly make a demand (before witnesses, of course) for payment or fulfillment of the agreement. In case the debtor refused to pay or denied the obligation, the creditor would have five years in which to recover from the debtor, but only one in which he could take action against the surety. It seems fair and equitable that the surety should not be subject to claim for as long a time as the principal, in case of delay on the part of the creditor in enforcing his claim.¹

Prothesmia in δίκη λιπομαρτυρίου.-- Our scanty information on the δίκη λιπομαρτυρίου is gleaned from a passing reference to it in Apollodorus vs. Timotheus² and the lexicographical notices based on this passage.³ It is clear that its purpose was to force recalcitrant witnesses to give testimony under penalty of a fine in case of refusal. It seems probable that it could be employed against any witness who failed to testify or take the ἑξωμοσία, not merely those who had promised their testimony.⁴

That the δίκη λιπομαρτυρίου had to be instituted before the arbitrator or the magistrate at the time the evidence was called for and not forthcoming is obvious from the nature of the suit, since its purpose was to force the witness to testify.⁵

¹Cf. Lipsius, pp. 713-4.

²Demosthenes xlix. 19.

³Pollux viii. 36; Lex. Seguer. v. 276. 31; Suidas, Photius s.v.

⁴This is the view of Lipsius (p. 785), who cites Demosthenes xxix. 15, where it is said of Aisios that his only alternative to testifying was to take a false oath or εὐθεὺς παραχρήμα δίκην ὀφλισκάνειν. This must refer to the summary procedure of δίκη λιπ.; κλητευσίς could not be called a dike; and εὐθεὺς παραχρήμα would not be used of an ordinary δίκη βλάβης.

⁵Lipsius rightly asserts (p. 784) that the δίκη λιπ. would have to be tried before the main suit could go on.

After the main suit was ended there would be no point in such a procedure, and the litigant's only recourse would be to enter a δίκη βλάβης against the defaulting witness, as Apollodorus did in the case just cited.¹

Prothesmia in wounding with intent to kill.-- The δίκη τραύματος ἐκ προνοίας² was a private suit lodged before the King Archon and tried before the Areopagus³ for wounding with intent to kill.⁴ The laws regulating its trial were among the νόμοι φονικαί.⁵ The penalty in case of conviction was perpetual exile and confiscation of property.⁶ There is no mention in the sources of any prothesmia applying; the only reference to time at all is in the speech against Simon⁷ where the speaker remarks that four years have elapsed since the supposed offense and that it is strange Simon didn't prosecute before if he really had a case. Four years, of course, is less than the usual five year prothesmia, so nothing can be concluded from the passage except, perhaps, that Simon had little confidence in his case.

It might be assumed from the fact that the δίκη τραύματος comes under the νόμοι φονικαί that there would be no prothesmia since there was none in homicide cases; but the chief reason no prothesmia applied in the latter was that the question of pollution was involved.⁸ This was not a factor in the δίκη τραύματος. Furthermore the suit dealt with an offense against a single individual-- was a diké. It is hard to conceive that an offense which was in reality little more than aggravated assault would

¹Demosthenes xlix. 20. Cf. also Plato Legg. 936 E-937 A.

²Caillemer (p. 27) wrongly treats this as a graphé.

³Aristotle Ath. Pol. lvii. 3; Pollux viii. 117.

⁴Lysias iii. 28, 42; iv. 5-6. ⁵Demosthenes xxiii. 22.

⁶Lysias iii. 38. ⁷Ibid. 19-20. ⁸Cf. pp. 27-32 infra.

be subject to prosecution forever. It seems safest to assume that in spite of the severe penalty and the jurisdiction of the Areopagus, the five year prothesmia for dikai applied here.

Prothesmia in prosecution for perjury.-- There was in Athens no regular appeal from the decision of a popular court. Practically the only recourse a defeated litigant had against an unfavorable verdict was an indictment for perjury brought against the witnesses of his opponent. Such an action was known as a δίκη ψευδομαρτυρίων.¹

The action for perjury could be brought against a witness for giving evidence that was illegal² or, as was much more frequent, for evidence that was false.³ The suit would normally come before the magistrate who had presided in the original case. Prosecutions for perjury before the Areopagus, however, were introduced by the Thesmothetae.⁴

At the conclusion of the trial, before the jurors had cast their votes, a herald asked each litigant if he intended to prosecute his opponent's witnesses for perjury. A declaration of intention to do so was an ἐπίσκηψις, the verb being ἐπισκήπτεσθαι τινὶ ψευδομαρτυρίων. No episkepsis was permitted after the casting of the ballots had begun.⁵ Thus the beginning of the voting in any suit marked the end of the period during which a declaration of intention to prosecute could be filed; which is to say that the prothesmia was immediate. Since the written form of the

¹General treatment: R. J. Bonner, Evidence in Athenian Courts (Chicago, 1905), pp. 88-93; E. Leisi, Der Zeuge im Attischen Recht (Frauenfeld, 1907), pp. 120 ff.; G. M. Calhoun, "ἐπίσκηψις and the δίκη ψευδομαρτυρίων", CP, XI (1916), 365-94.

²Demosthenes xlv. 6, 10. ³Ibid. xlvii. 1, e.g.

⁴Aristotle Ath. Pol. lix. 6; Pollux viii. 88.

⁵Ath. Pol. lxviii. 4: οὐ γὰρ ἔστιν ἐπισκήπτεσθαι, ὅταν ἄρξωνται διαψηφίζεσθαι.

plaint was very simple¹ it would be handed to the presiding magistrate at the time the declaration was made, and thus the episkepsis may be considered equivalent to the filing of the suit as well as a declaration of intention.²

In one case of δίκη ψευδομαρτυρίων we know that the prosecution took place ten years after the evidence was offered in court. In Isaeus' speech on the estate of Dicaeogenes,³ Dicaeogenes III, at the death of Dicaeogenes II (the legator), had received one third of the estate when his father produced a will showing that he had been posthumously adopted as son of the legator. The four sisters of Dicaeogenes II received and divided the other two thirds of the estate.⁴ Twelve years later⁵ Dicaeogenes

¹Cf. e.g. Demosthenes xlv. 46.

²Lipsius, p. 781 and n. 11; Leisi, p. 126. Cf. Plato Legg. 937 B for similar provisions. Calhoun, pp. 366-70, holds that the episkepsis was merely an oral impeachment and was separate from the written plaint beginning the action. He bases this view on four passages: (1) Demosthenes xlviii. 31, 44-45. In 31 and 44 the speaker remarks that he had kept silent when false testimony was being offered. In 45 he says that he might have ἐπισημαίνουσαι the witnesses. It is not necessary to regard 31 and 44 as referring to a formal episkepsis. He had the same right as everyone else to call the speaker a liar in open court without its being a legal action. But if this does refer to an episkepsis it cannot be the kind mentioned by Aristotle, which had to be made after the ballots were distributed but before they were cast. (2) Demosthenes xlvi. 7. Calhoun doesn't think it possible to indict two sets of witnesses in one written plaint: ἀληθῆρες and ὁ ἐμαρτυροῦν. Whether the episkepsis were oral or written it would have to be in double form; according to Calhoun's own admission one act must give the right to prosecute witnesses until the guilty one is found; this would be the same whether the episkepsis were oral or written. (3) Ath. Pol. lix. 6. The Thesmothetae bring in δίκη ψευδ. arising from cases before the Areopagus. Calhoun objects that only the magistrate before whom a plaint was laid could bring in that case. But in Ath. Pol. lviii. 2, the Forty bring in suits whose ἐγκλήματα have been lodged before the Polemarch. (4) Demosthenes lii. 28. The episkepsis mentioned here cannot be the ordinary kind since it takes place during the trial itself. This seems to have been designed to interrupt proceedings and force a witness to take an oath. If the oath were not taken, the episkepsis would be renewed at the end of the trial, and a δίκη ψευδ. begun. If we are to accept Calhoun's theory of Demosthenes xlviii. 31 and 44, this must be the type of episkepsis there contemplated.

³Isaeus v.

⁴Ibid. 6.

⁵Ibid. 7

III came forward with another will which supposedly proved that he had been adopted as heir to the whole estate. The case came to trial and Dicaeogenes won.¹ Polyaratus, the husband of one of the sisters, indicted Dicaeogenes' witnesses for perjury, but before the case came to trial, he died.² Ten years later,³ Menexenus, nephew of Polyaratus and cousin of the present speaker, brought to court Lycon, one of Dicaeogenes' witnesses, and convicted him of perjury.⁴

How could Menexenus prosecute a δίκη ψευδομαρτυρίων without having made an episkepsis at the time of the false testimony? The best explanation seems to be that Menexenus was here acting as the inheritor of Polyaratus' case and was prosecuting the latter's episkepsis; for Polyaratus had presumably been acting in behalf of the three sisters and their children, all of whom had an equal interest in the case and an equal right to take it up when it was halted by the death of its initiator. The required episkepsis had been made at the right time and failed to come to trial only because of Polyaratus' death. If the episkepsis had not been made during the earlier trial, of course, Menexenus would never have been able to prosecute an action for perjury, nor would he have been able to start the whole proceeding de novo. The suit he wished to enter had already been tried and could be reopened only by a successful δίκη ψευδομαρτυρίων. Such a diké

¹Ibid. 8.

²Ibid. 9: καὶ ἡμεῖς μὲν καταψευδομαρτυρηθέντες ἀπωλέσαμεν τὰ ὄντα· καὶ γὰρ ὁ πατήρ οὐ πολλῷ χρόνῳ ὕστερον μετὰ τὴν δίκην ἐτελεύτησε, πρὶν ἐπεξελεῖν οἷς ἐπεσκήσατο τῶν μαρτυρῶν.

³Ibid. 35.

⁴Ibid. 12: Μενέξενος γὰρ ὁ Κηφισοφῶντος υἱός, ἀνεψιὸς ὢν Κεφισοδότῃ τουτῷ καὶ ἐμοί, καὶ προσήκων αὐτῷ τοῦ κλήρου ὅσον περ ἐμοί, ἐπεξῆει τοῖς καταμαρτυρήσασιν ἡμῶν καὶ ἐκεῖνου τὰ ψευδῆ, καὶ Λύκωνα, ὃν περ εἰσήγαγε πρῶτον εἰς τὸ δικάσθηριον, τοῦτον εἶλεν.

could not be brought except on the basis of an episkepsis made at the right time: after the ballots had been distributed but before they had been cast in the previous trial. Such an episkepsis had been made, by the only authorized person, and the witnesses stood impeached even though the trial was delayed ten years by the death of Polyaratus and the minority of the other claimants. The Athenian legal code which allowed suits for inheritance at any time within the lifetime of the κληρονόμος¹ would certainly not deny the use of the δίκη ψευδομαρτυρίων to those who were minors at the time of the award and whose claims could be validated only by its use;² especially in the present instance where the prosecution had already been duly initiated by Polyaratus, and only his death and the minority of the other interested parties had prevented it from being successfully completed.³

Entering an episkepsis did not suspend the verdict in the main suit⁴ except in cases where life, liberty and civil rights were at stake,⁵ or where it was entered in opposition to a diamartyria.⁶ In the latter case the diamartyria would have the same status as a paragraphé⁷ and would have to be disposed of before

¹Cf. pp. 55-58 infra.

²The Athenian concern over insuring the right to inheritance is also well illustrated by the fact that the ἀτελεία of ephebes was waived in inheritance cases. Cf. Aristotle Ath. Pol. xlii. 5.

³Cf. Lipsius, Nachträge to p. 780 n. 9. The thesis of M. San Nicolò ("Beiträge zur Kenntnis des Griechischen Rechtes in Ägypten," Archiv für Kriminalanthropologie, LIII [1913], 348) that a δίκη ψευδ. could be brought after a lapse of time and without episkepsis, which was based on this passage alone, collapses if the above explanation is correct.

⁴Demosthenes xlvii. 49.

⁵Leisi, p. 127.

⁶This is perhaps the most frequent use of the δίκη ψευδ. Cf. Isaeus' speeches on the estates of Menecles, Pyrrhus and Philoctemon.

⁷Isaeus v. 17. For use and application of paragraphé, see p. 62 infra.

the main suit could proceed.¹

Public Suits

General prothesmia in graphai.-- Whereas a general five year prothesmia applicable in all dikai is quite well attested, the situation in regard to graphai is not so clear; only the requirements in connection with the special γραφή παρανόμων are adequately described. Nowhere is there a statement of any general prothesmia in graphai. In spite of the scantiness of the evidence on the subject, an examination of it may at least give us a basis for plausible conjecture.

A client of Lysias, charged with impiety on the ground that he had removed one of the sacred olive stumps from his property, tells of the large number of people who had rented that property from him, and says:

πῶς ἂν ἐτόλμησα τοσοῦτων μεμισθωμένων καὶ πάντων συν-
εϊδόντων ἄφανίσαι τὸν σῆκον βραχέος κέρδους ἕνεκα, προθεσμίας
δὲ οὐδεμιᾶς οὐσης τῷ χινδύνῳ, τοῖς εἰργασμένοις ἅπασι τὸ χω-
ρίον ὁμοίως προσήκον εἶναι σὺν τὸν σῆκον, ἵν' εἴ τις αὐτοῦς
ῥητιᾶτο, εἶχον ἀνενεγκεῖν ὁτῷ παρέδοσαν;²

A statement which indicates definitely that there was no prothesmia in γραφή ἀσεβείας.³

In Apollodorus vs. Neaira, Apollodorus is prosecuting Neaira (apparently by a γραφή ξενίας) for living as a wife with Stephanos, a citizen, though she herself was an alien. Now many years, certainly more than five, had elapsed since she first went to live with Stephanos, as is evident from the fact that her

¹San Nicolò (p. 355), who seems to believe that the δίκη ψευδ. might have suspensory effect, states that in Isaеus v. 17 the trial of the diamartyria is suspended by the action of the δίκη ψευδ. But the only way a diamartyria could be brought to trial was by the impeachment of the deposing witnesses. Trial of the diamartyria was brought on, not postponed, by the δίκη ψευδομαρτυρίων. The trial of the main suit had already been stopped by the diamartyria itself. Cf. Lipsius, Nachträge to p. 781 n. 14; Leisi, pp. 128-9.

²Lysias vii. 17.

³Caillemer, pp. 24-25.

daughter Phano is described as a παῖδάριον μικρόν when she first went to live with him; enough time has now elapsed for Phano to have been married to Phrastor,¹ be divorced by him and bear his child;² be married to Theogenes³ and be divorced by him in turn.⁴ If there was a prothesmia in γραφή ξενίας it must have been much longer than the usual five years; otherwise Apollodorus would have had to deal with it in his speech.

From these two bits of evidence it is possible to conclude that no prothesmia protected the guilty party from graphai in any case in which the state itself was considered to be the injured party. Another fact that corroborates this assumption is the apparent absence of prothesmia in the ἀπογραφή, or suit for confiscation, which was a special type of graphé. In Lysias' speech against Poliochus an apographé was brought (for reasons now unknown) against the sons of Eucrates apparently seven years after their father's supposed offense.⁵

It is logical, however, to regard the graphai in which a private individual is the injured party in a somewhat different light. There is nowhere any statement on the matter, nor is there a case in which a graphé can be shown to have been entered more than five years after the supposed offense. In the oft-quoted Phormio passage the statement is made: τοῖς μὲν γὰρ ἁδικουμένοις τὰ πέντ' ἔτη ἱκανὸν ἡγήσατ' (Σόλων) εἶναι εἰσπράξασθαι . . .⁶ There is nothing in the phraseology to limit this prothesmia to private suits, and τοῖς ἁδικουμένοις can apply to those who bring

¹Demosthenes lix. 50.

²Ibid. 56.

³Ibid. 72.

⁴Ibid. 83.

⁵Lysias xviii. 5, 15. Cf. W. R. M. Lamb, Lysias with an English Translation, "Loeb Classical Library," (London, 1930), p. 398.

⁶Demosthenes xxxvi. 27. Cf. p. 3 supra.

graphai as well as those who bring dikai. Then, too, owing to the Athenian fondness for providing many methods of prosecution, a number of dikai and graphai differ from each other only in the procedure and punishment involved. A thief could be prosecuted (among other methods) by either a δίκη or γραφή κλοπῆς.¹ If the diké had to be entered within five years, is there any reason for supposing that the graphé could be brought at a later date? It is hardly likely.

Altogether the most satisfactory assumption on the basis of such evidence as we have is that graphai arising from injuries to an individual were limited by the same five year prothesmia that applied in most dikai; whereas those arising from injuries to the state were not limited at all.

The εἰσαγγελία is undoubtedly to be regarded in the same light as the graphé dealing with offenses touching the public safety. There is nowhere any indication of a prothesmia limiting the eisangelia, nor is there any likelihood that there ever was one. On the other hand there is only one case arising from an eisangelia which is known to have taken place any considerable time after the supposed offense: the case of Leocrates, which was tried eight years² after Leocrates' flight at the time of the battle of Chaeronea. But even if there had been a prothesmia, it would probably not have been operative in this case since Leocrates had been out of Athenian jurisdiction all this time.³ Although it is not likely that any prothesmia limited the right to bring eisangeliae, it would doubtless have been futile to introduce one after any great lapse of time, since the cooling of

¹Demosthenes xxii. 26-27. Cf. also the γραφή ὕβρεως and δίκη αἵματός in Demosthenes liv. 1. See also Bonner and Smith, Vol. I (Chicago, 1930), p. 173.

²Lycurgus In Leocr. 45.

³Cf. pp. 66-67 infra.

public indignation would make it very difficult to secure a conviction. This was probably the reason why Leocrates was acquitted in the case just mentioned.¹

The same is probably true for the φάσις. This process was really a special type of graphé, in connection with which it is often mentioned.² It was a confiscatory action against those who had injured the public treasury. Most examples of phasis were against direct injuries to the treasury, and as such they would be treated in the same fashion as graphai against injuries to the state; that is, there would be no prothesmia and the state could recover at any time. This would also be parallel to the situation regarding debts to the state treasury.³ Only the φάσις ὀρφανικοῦ οἴκου⁴ could be considered as dealing with an injury to a private individual. Would there be no limitation to this phasis? It is the freest conjecture, but since this type of phasis was primarily intended to protect the rights of a minor orphan, and since an orphan on reaching his majority would be in a position to defend his own rights by means of the δίκη ἐπιτροπῆς,⁵ it would seem logical that the φάσις ὀρφανικοῦ οἴκου should be confined to the period preceding the dokimasia of the orphan.⁶

Prothesmia in the graphé paranomon.-- The graphé paranomon (γραφὴ παρανόμων)⁷ was an indictment brought against an

¹Aeschines iii. 252.

²Andocides i. 88; Demosthenes lviii. 6, 45.

³Cf. p. 7 supra. ⁴Demosthenes xxxviii. 23.

⁵Cf. pp. 7 ff. supra. ⁶Cf. p. 8 supra.

⁷For discussion of graphé paranomon: Lipsius, pp. 383-97; G. Glotz, "Paranomôn graphe," Dictionnaire des antiquités grecques et romaines, eds. C. Daremberg and E. Saglio, Vol. IV, Pt. 1 (Paris, 1907); G. Gilbert, The Constitutional Antiquities of Sparta and Athens, translated by E. J. Brooks and T. Nicklin (London, 1895), pp. 299 ff.; Bonner and Smith, I, 225, 264 ff.

unconstitutional law or illegal decree.¹ As such it was often considered to be one of the strongest bulwarks of democracy.²

There were two parallel indictments which could be brought against a proposal: the *graphé paranomon*, which attacked it on grounds of illegality; and the *γραφὴ νόμον μὴ ἐπιτῆδειον θεῖναι*, which attacked it as contrary to the interests of the state.³ These two suits arose from the same need and were so closely bound together that it was natural that they should often overlap. Thus a person indicting a law on formal grounds would naturally try to show that the law was not only unconstitutional, but also contrary to the best interests of the people-- *μὴ ἐπιτῆδειον*.⁴ Such a demonstration was not, of course, required, but it would serve to strengthen the case and would probably have more weight with the jury than would an attack based on technicalities alone.

A *graphé paranomon* was introduced by an *ὕπομοσις*⁵ which was a formal notice that the law would be attacked, and which suspended the law's action until the *graphé paranomon* had been tried.⁶ The *hypomosia* in itself might be enough to frighten the proposer into withdrawing his measure.⁷

¹Pollux viii. 44. Lack of a *προβούλευμα* made a decree illegal: Aristotle *Ath. Pol.* xlv. 4.

²Demosthenes xxiv. 154; Aeschines iij. 5. Cf. the haste with which the oligarchs rescinded the *graphe paranomon* before proposing their constitutional changes in 411: Thucydides viii. 67. 2; *Ath. Pol.* xxix. 4.

³Evidence for the separate existence of a *γραφὴ νόμον κατ.*: Demosthenes xxiv. 33; xx. 88, 95 et passim (this oration is itself an example of the procedure); and the statement in *Ath. Pol.* lix. 2, where the two processes are mentioned side by side. Cf. Lipsius, p. 383 n. 33. Pollux viii. 87-88.

⁴Demosthenes xxiv. 68.

⁵Pollux viii. 44.

⁶*Ibid.* 56.

⁷Bonner and Smith, I, 266. On the other hand there is at least one instance where the withdrawal of the *hypomosia* was forced by threats in the Ecclesia: during the trial of the generals after Arginusae. Xenophon *Hell.* i. 7. 11 ff.

The *graphé paranomon* and its counterpart the *γραφὴ νόμον* κτλ. were *τίμητοι* (that is, the jury fixed the penalty),¹ and were tried under the presidency of the *Thesmothetae*.² The penalty might range from a few drachmas to death.³ One who had thrice succumbed to a *graphé paranomon* lost the right to propose measures again.⁴

A *graphé paranomon* could be brought against an illegal or inexpedient law or decree at any time; no *prothesmia* protected it. The proposer of the law, however, was responsible (*ὀπεύθυνος*) for his measure for one year only.⁵ This is clearly demonstrated in the Leptinean oration:

διδὲ γὰρ τὸ τελευτήσαι, Βάθιππον τὸν τουτουὶ πατέρ' Ἀψε-
φίωνος, ὃς αὐτὸν ἐπ' ὄνθ' ὀπεύθυνον ἐγράψατο, ἐξηλθόν οἱ χροδ-
νσι, καὶ νῦν περὶ αὐτοῦ τοῦ νόμου πᾶς ἐσθ' ὁ λόγος, τοῦτω
δ' οὐδεὶς ἐστὶν κίνδυνος.⁶

In the hypothesis to the same speech is the following statement:

νόμος γὰρ ἦν τὸν γράψαντα νόμον ἢ ψήφισμα μετὰ ἐνιαυτὸν
μὴ εἶναι ὀπεύθυνον. ὅμως ἐπειδὴ καὶ οὕτω κατὰ τῶν νόμων ἐξῆν
ποιεῖσθαι τὰς κατηγορίας, καὶ οἱ γράψαντες ἔξω κινδύνων ὦσι,
μετὰ ἐνιαυτὸν ἐπέστη κατήγορος Ἀψεφίων υἱὸς Βαθίππου, ὃ συν-
ηγόρει φορμίων ὁ ῥήτωρ, καὶ Κτήσιππος ὁ υἱὸς Χαβρίου ὃ συνηγόρει
Δημοσθένους.⁷

It is true that this speech was delivered⁸ to support a

¹Aeschines iii. 210; Demosthenes xxiv. passim.

²Aristotle Ath. Pol. lix. 2.

³Hypereides Pro Euxen. 18; Demosthenes xxiv. 138, 208.

⁴Diodorus xviii. 18; Demosthenes li. 12.

⁵Cf. Caillemer, pp. 27-30. The *prothesmia* would, of course, be suspended by the *hypomosis*; it would not continue to run while the trial was pending. Cf. the case of Ctesiphon, Aeschines iii. 219, 242, 254. Cf. pp. 63-66 infra.

⁶Demosthenes xx. 144.

⁷Ibid. Hypothesis 2. 3.

⁸Leptines ceased to be *ὀπεύθυνος* because Bathippus' *hypomosis* lapsed at his death. In the case of Ctesiphon, however, though the trial was delayed more than seven years, the *prothesmia* never applied (Aeschines iii. 219, 242, 254). Ctesiphon had been indicted within the year, and the suit never lapsed.

γραφῇ νόμον κτλ. rather than a graphé paranomon, but the two procedures are really two aspects of the same thing and it is hard to conceive of the prothesmia varying. Then, too, the statement in Demosthenes is that the proposer of a law or decree is "not responsible for his measure after the lapse of a year," and this applied equally well to a graphé paranomon or a γραφῇ νόμον μὴ ἐπιτήδειον θεῖναι.¹

Suppose, however, the proposer of the decree chose to defend it after a year had gone by; did this make him responsible again? The passage in the Leptinea² would seem to disprove this, since Leptines is defending the law himself and yet the statement is made that there is no danger for him. If a man had thrice proposed measures which had later been repealed by the graphé paranomon, even though the procedure had been instituted after he had ceased to be ὑπεύθυνος, was he therefore deprived of the right to propose measures in the assembly again? No, since the law, as stated³ provides that a person becomes atimos if he is τοῖς ἡλωκῶς παρανόμων. ἡλωκῶς is used only of a man who has been convicted; if he has ceased to be ὑπεύθυνος the law is ἡλωκῶς, but not the proposer. He is really in much the same position as the συναπολογησόμενοι⁴ who are to defend laws which are attacked without incurring any personal responsibility. This is the position of Leptines.

There is no satisfactory explanation as to why the prothesmia was for one year in the case of the proposer of a measure;

¹The following examples of graphé paranomon are extant: (a) Against laws: for prosecution, Demosthenes xxiv. (b) Against decrees: for prosecution, Demosthenes xxii, xxiii; Aeschines iii; Hypereides *Contra Phil.* For defense: Demosthenes xviii. Demosthenes xx is for prosecution in a γραφῇ νόμον κτλ.

²Demosthenes xx. 144.

³Diodorus xviii. 18.

⁴Demosthenes xxiv. 23.

apparently it was an arbitrary limit just as was the five year prothesmia in dikai. One might venture the suggestion that the proposer of a decree or law was viewed in some way as a sort of temporary nomothete whose responsibility, like that of other officials was for one year. But such a conjecture is quite incapable of proof.

Homicide Cases

The question of a prothesmia applicable in homicide cases presents special problems of its own because of the technical status of prosecutions for that crime in Athens, and the attitude of the Greeks in general toward murder.

Technically a prosecution for homicide was a diké rather than a graphé. Normally dikai were resorted to in cases where an injured party sought redress for an offense which had harmed him personally without directly affecting the interests of the state. In the case of the graphé, which we may regard as roughly equivalent to our criminal prosecution, the supposition was that the state itself had in some way been injured. In our legal system a public prosecutor, representing the state, has charge of a criminal suit; in Athens "whoever wished" -- ὁ βουλόμενος¹-- could prosecute in the name of the people.

Contrary to our legal concept, however, the Athenian religious law made murder a private case on the theory that the dead man's relatives-- his γένος-- constituted the injured party, and that it was their prerogative to seek redress if they wished. But the theory of blood guilt (which was absent in the older patriarchal state)² later caused difficulty here. The taking of

¹Aristotle Ath. Pol. ix. 1.

²Bonner and Smith, I, 53; G. Glotz, La solidarité de la famille dans le droit criminel en Grèce (Paris, 1904), pp. 228-31.

human life tainted the slayer with blood-guilt which could be removed only by appeasing the shade of the murdered man and by undergoing ritual purification. Blood-guilt, furthermore, was contagious and a blood-guilty man was as much a danger to a city as a man suffering from plague. Perhaps the slaying of a man concerned his relatives alone, but the spreading of pollution concerned the whole state.¹ To this extent, then, murder was an offense against the state; and it is not hard to see how a homicide case could take on many aspects of a public suit, even though it remained technically a *diké*.

In most *dikai*, where one party alone alleged injury, it might reasonably be supposed that failure promptly to begin prosecution indicated that there had been no offense; at any rate it was no concern of the state if the allegedly injured party failed to take action. But in the case of homicide the circumstances were different; the state might not be particularly interested in the fact that a man had been murdered, but it could not help being concerned over the fact that a murderer was at large and was spreading pollution to the detriment of the entire community. That the attitude of the state toward homicide was purely one of self-protection is indicated by the fact that a murderer was at liberty to go into exile; even in the midst of his trial he might get up and leave the country unhindered;² the important thing was to get rid of his presence which was a source of danger.

The above arguments constitute an *a priori* case against the existence of any *prothesmia* in homicide prosecution. To put the matter succinctly:

In other types of *dikai*:

¹Glötz, *Solidarité*, pp. 232-3. For feeling on blood-guilt, cf. Antiphon ii. α. 3, 10; iv. α. 2-6.

²Demosthenes xxiii. 69.

(1) The failure of the allegedly injured party to enter suit within a reasonable length of time created a strong presumption that he had no grounds of complaint.

(2) If an actually injured party did not care to take legal measures, that was no concern of the state.

In the case of homicide:

(1) The really injured party, the slain man, was in no position to do anything about it; the legally injured parties, his relatives (up to and including first cousins)¹ were only indirectly injured and for various reasons might not wish to prosecute: they might, for example, be intimidated or bought off;² they might be in collusion with the murderers; they might be murderers themselves; or there might be no relatives. It could even happen that the proper avenger was not of age at the time of the murder, and the prosecution might thus be deferred.³

(2) It was definitely the concern of the state whether or not a murderer was prosecuted, for the fact of his being polluted affected not only the relatives but the whole state as well. It would be quite illogical to have any kind of prothesmia in a case of this kind, for the slayer would be no less polluted and no less a menace to the state through the failure of the relatives to prosecute within five years (or any other prescribed period); and the pollution would be no less strong and no less dangerous through the passage of time. Supporting this conclusion, the sources give us no evidence for a prothesmia in homicide cases, and rather strong arguments against it.

There are two pieces of positive evidence against a prothesmia:

¹Demosthenes xliii. 57.

²Ibid. lviii. 28.

³E.g. Antiphon i. 30.

(1) We know that the speaker in the Agoratus case entered his suit several years after the alleged offense; he remarks ironically:

μήτε οὖν ταῦτα αὐτοῦ ἀποδῆσθε, μήτ' ἐάν λέγῃ ὅτι πολλῷ χρόνῳ ὕστερον τιμωροῦμεθα. οὐ γάρ οἶμαι οὐδεμίαν τῶν τοιοῦτων ἀδικημάτων προθεσμίαν εἶναι, ἀλλ' ἐγὼ μὲν οἶμαι, εἴτ' εὐθύς εἴτε χρόνῳ τις τιμωρεῖται, τοῦτον δεῖν ἀποδεικνύναι ὥς οὐ πεποίηκε περὶ ὧν ἐστὶν ἡ αἰτία.

It might be argued that he is not referring to murder in general but to the type of prosecution he is using here, the *apagógē*; his meaning then would be that *apagógē* was not limited by any *prothesmia*. But it is impossible to get any sense out of *τοιοῦτων ἀδικημάτων* other than "wrongs of such a nature," which surely refers to homicide rather than to any specific procedure.

(2) A young man who is prosecuting his stepmother for murder by poison remarks that his dying father enjoined him while he was still a boy (*παῖδι ὄντι*)² to take vengeance for the murder. He was a *παῖς* at the time of the slaying, and now is old enough to prosecute; several years must have elapsed, but there is no mention in the speech of any claim to *prothesmia* advanced by the defense.

The only passage from which one might argue for a *prothesmia* in homicide cases is in Demosthenes' speech against Aristocrates. The speaker is attacking the proposal of Aristocrates that a decree be passed honoring and giving special pro-

¹Lysias xiii. 83. Lipsius, p. 853 n. 24, considers this statement a mere expression of opinion. But it is hard to believe that a man of Lysias' standing would depend on memory alone for so important a fact, when he could make certain so easily by examining the inscribed laws. Lysias xiii. 56 and x. 4, 31 are other examples of homicides being prosecuted after a considerable lapse of time. The latter refers to a period of five years, but whether it is just under or just over that period (the most important point) cannot be determined.

²Antiphon i. 30. This is a *δίξη φόνου*; at this time there was no distinct prosecution for *βολεύσεις*. Lipsius, pp. 125 ff.; L. Gernet, *Antiphon: Discours*, "Collection des universités de France" (Paris, 1923) pp. 138-9.

tection to Charidemus, an Euboean mercenary whom the Athenians wished to win over for their campaign against Philip. The special protection consisted in establishing a penalty of summary execution for anyone who should murder him. The speaker in this case claims that the proposal of Aristocrates will undermine the regularly constituted homicide courts; he then proceeds to enumerate these courts and tell a good deal about them. After describing the five usual homicide courts (Areopagus, Palladium, Delphinium, Prytaneum and in Phreatto), he says:

And there is still a sixth method of procedure besides all these, which this man (Aristocrates) has equally slighted in proposing this decree. If a person is ignorant of all these methods, or if the time has gone by in which each of these things should have been done, or if for any other reason he does not wish to make use of these processes; and if he sees the murderer going about in the holy places and the agora, he may arrest him and take him off to jail. . . .¹

Some² have seen in the expression "the time has gone by etc." (παρεληλῦσθαι οἱ χρόνοι ἐν οἷς ἔδει τούτων ἕκαστα ποιεῖν) an indication of a prothesmia which limited the right of the relatives to prosecute in the regular homicide courts. Such an interpretation would invalidate the a priori assumption that there could be no prothesmia in such cases; therefore it is advisable to see if a more satisfactory explanation cannot be found.

We know from the Choreutes case that the King Archon was not permitted to accept an indictment for homicide during the last three months of his office.³ The law provided that the same official must have charge of the case through the three prelim-

¹Demosthenes xxiii. 80.

²Lipsius, p. 853 n. 24; and apparently Glotz, *Solidarité*, p. 429. No point can be made from the plural οἱ χρόνοι; ὁ χρόνος and οἱ χρόνοι are interchangeable. Cf. οἱ χρόνοι (Demosthenes xx. 144) with τοῦ χρόνου (Hypothesis 2 ad Demosthenes xx, 1) where both refer to a one year period (*Ibid.* 3). Cf. also Aristotle *Ath. Pol.* lvi. 3.

³Antiphon vi. 38, 42.

inary hearings (προδικασίαι) and the trial itself. The King could not accept any case during the last three months because the hearings had to be a month apart, and that would make it necessary for him to turn over the uncompleted case to his successor. With this in mind it seems best to interpret the expression παρ-εληλυθασιν οἱ χρόνοι as referring to the time during the King's term when it was impossible to indict for murder; for if this time had gone by, it was no longer possible for anyone to enter an indictment for homicide before a regular court until a new King had taken office; and if anyone wished to prosecute immediately, his only recourse would be to the ἀπαγωγὴ ἀτίμων which Demosthenes describes in the passage above cited.¹

From the foregoing evidence and arguments it may be concluded that no statute of limitations ever prescribed the right of the relatives to prosecute for murder.²

The Heiress

The Athenian institution of the epikléros (ἐπίκληρος) is among the most striking and at the same time most difficult in the field of Athenian law, partly, perhaps, because it is without any modern parallel.³ The epikléros was an orphan girl, without

¹Cf. W. Passow, "Verjährung in Blutsachen," Hermes XXV (1890), 468. For apagoge, cf. pp. 49-52 *infra*.

²Similar conclusions reached by Lipsius, p. 853; Gernet, Lysias: Discours, "Collection des universités de France," (Paris, 1924), p. 211 n. 1; and *ibid.*, Antiphon, p. 33.

³The following authors deal with the institution at some length: W. Wyse, The Speeches of Isaeus with Critical and Explanatory Notes (Cambridge, 1904), especially commentaries on orations iii, vii, and x; E. Hruza, Die Ehebegründung nach Attischem Recht, "Beiträge zur Geschichte der Griechischen und Römischen Familienrechtes" (Erlangen, 1892, Vol. I; E. Hafter, Die Erbtochter nach Attischem Recht (Leipzig, 1887); E. Caillemer, Le droit de succession légitime à Athènes, "Etudes sur les antiquités juridiques d'Athènes" (Paris, 1879); A. Ledl, Studien zum Attischen Epiklerenrecht (Graz, 1908); L. Beauchet, Histoire du droit privé de la république athénienne (Paris, 1897), Vol. I.

brothers or a paternal grandfather, left with the entire estate.¹ Her function as epikléros was to provide a son to occupy the religious and legal position of son to her father. The reason for this lies in the feeling that for a man's family to die out was a major calamity,² and that some artificial means must be sought to prevent it from happening.³ The father might provide by will for the marriage of his daughter;⁴ if, however, no arrangement of this kind was made, the girl was described as "claimable"⁵ (ἐπίδοχος). Someone of her γένος, usually the nearest of kin (ἀγγιστεύς) entered a claim before the Archon for her hand;⁶ this claim was called an ἐπίδοκασία.⁷ The right to marry the epikléros depended on closeness of relationship, and since her husband would have control of the estate until her first born son came of age,⁸ it is obvious that occasions might arise in which the right to marry her would be a subject of dispute.

Under most circumstances, no question of prothesmia could be involved: the anchisteus would marry the girl himself, or step aside and allow some other one of her kindred to claim her by

¹Harpocration s.v. ἐπίδοχος.

²Isaeus vii. 30. Other expressions of a similar view: *ibid.* ii. 7, 36, 43; iii. 61. Demosthenes xliii. 12, 80. Isocrates xix. 3, 34, 41, 47. Cf. Wyse, p. 361. For Hindu parallels: Hafter, pp. 1-4; Beauchet, pp. 398-401.

³Cf. pp. 58-59 *infra*.

⁴He was forbidden by law to dispose of his estate separately from his daughter or daughters: Isaeus iii. 68.

⁵Caillemet (*Succession*, p. 41) wrongly interprets: " . . . L' épicière devenait en quelque sort une chose litigieuse."

⁶Demosthenes xliii. 55-56; Isaeus iii. 74; viii. 51. Cf. Hafter, p. 3; Hruza, pp. 91, 107 ff.; Beauchet, pp. 453-4.

⁷Demosthenes xlviii. 26-27; Andocides i. 120. For description of the procedure in epidikasia, cf. Andocides i. 117-21; Aristotle *Ath. Pol.* xliii. 4; Hafter, pp. 45-46; Lipsius, pp. 578-82.

⁸Isaeus iii. 50; viii. 31. Demosthenes xlvi. 20.

epidikasia.¹ Failing any relatives who were willing to marry the epiklóros, it was the duty of the anchisteus to betroth her to an outsider by means of ἑγγόσις, just as if he were her father.²

There are, however, three situations in which it is necessary to determine whether the girl was epidikos in order to establish what prothesmia, if any, applied.

(1) If the anchisteus had forfeited his rights to marry the girl, and had allowed her to be claimed by someone else; or if he had married her to an outsider, did he have any further claim upon her? Could he at a later date change his mind and force the dissolution of her marriage in order to take her for himself? It is to our purpose to examine this question, for if the anchisteus did have the right to claim her back, it would be necessary for us to try to ascertain the existence or non-existence of a limit to that right. In the first place, we may assume that any relative waiving his right to the epiklóros would have to do so before witnesses. This stands to reason, for no relative and certainly no outsider would be willing to accept a girl in marriage if he knew that her next of kin had reserved the right to claim her back at any time he wished. For this reason the person marrying her would undoubtedly require the presence of witnesses at a formal renunciation of rights by the anchisteus. This would preclude any possibility of her being reclaimed. Then, too, any anchisteus who exhibited such small regard for the rights and condition of the epiklóros would certainly expose himself to prosecution by a δίκη or εἰσαγγελία κακώσεως τῆς ἐπικλήρου, an extremely dangerous suit to fight.³

¹Beauchet, pp. 435-6; Andocides i. 120.

²Beauchet, p. 436; Lipsius, p. 471 and n. 9.

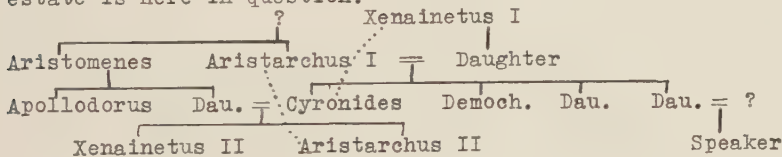
³Ledl, II, 9 and n. 2.

The above hypothesis seems contradicted by a passage in Isaeus where the speaker claims that his father (who, an outsider, had married the speaker's mother, an epikléros) had refrained from claiming his wife's property because Aristomenes, her original $\alpha\upsilon\tau\iota\omicron\varsigma$, had threatened to revoke his engyesis and marry the woman himself.¹ Aside from the improbability of his father's being willing to marry an epikléros under such circumstances, there is the fact that the speaker is hard pressed to explain why for some thirty-seven years no claim has been made for the estate which he now wishes to obtain.

It is necessary to discuss this case in detail not only because of its bearing on the present discussion, but because reference will be made to it in connection with inheritance cases and with the application of the prothesmia.² Aristarchus I had four children: Cyronides, Demochares, and two daughters, one of whom died early and was thus eliminated from any consideration in the adjudication of the estate; the other was the mother of the present speaker. Cyronides was posthumously adopted as son to his maternal grandfather Xenainetus I, and thus lost his claim on the estate of his father. At the death of Aristarchus I, Demochares was left as the presumptive heir, but he died before reaching his majority.³ Aristomenes, a brother of Aristarchus I, became guardian of his niece, the speaker's mother; but instead of marrying

¹Isaeus x. 19.

²Below is appended the family tree of Aristarchus I whose estate is here in question.



³Isaeus x. 4.

her himself or having her awarded to his own son Apollodorus, he betrothed her to an outsider, the father of the present speaker. Aristomenes married his own daughter to Cyronides and (according to the speaker) dowered her with the estate of his brother Aristarchus I.¹ Cyronides had two sons by the daughter of Aristomenes, Aristarchus II and Xenainetus II. On the death of Cyronides, Aristarchus II was adopted posthumously as son of Aristarchus I and inherited his property.² When Aristarchus II died, his brother Xenainetus II claimed the estate and was opposed by the present speaker, who charged that the estate had never rightfully belonged to Cyronides and his heirs, but rather to his own mother, and that she had been defrauded of her property by Aristomenes, her guardian. His claim was based on the allegation that his mother was the *epikléros* of her deceased brother, Demochares; and that Aristomenes was legally bound to marry her himself, allow another relative (presumably his son Apollodorus) to marry her, or to betroth her to an outsider; but that in any case the property should have gone with her.³ It is now probably well over thirty years⁴ since the death of Aristarchus I, and the question naturally arises why neither the speaker nor his father had ever claimed the property in all this time. The plaintiff anticipates this objection, and states that his father would have done so, but that Aristomenes had threatened to revoke his *engyesis* and claim the *epikléros* for himself if any attempt were made to claim

¹Isaeus x. 5.

²Ibid. 6.

³Ibid. 5. Cf. also Isaeus iii. 68.

⁴The speaker fought in the Corinthian War of 395-86 (20); he must have been at least eighteen at this time, so he was probably born 413-04. Aristarchus I died a short time before this, presumably (X years). The present speech was given during the Theban War pf 378-71 (22). If we take the highest possible elapsed time, we get forty-one plus X years; if the lowest, twenty-six plus X years.

the estate. This, said the speaker, was what prevented his father from carrying the case further. He himself had been prevented by military service and temporary atimia from exercising his rights. But the plot was now exposed.¹ First of all, since a sister did not become epikléros of her own brother, the speaker's initial basis of claim is vitiated.² The following reconstruction seems to be the most reasonable: On the death of Demochares, his sister -- the speaker's mother-- became his legal heir, though not his epikléros. The difficulty, however, lay in the fact that the estate was not only encumbered but non-existent. The speaker admits that his opponents have claimed this;³ he does not try to disprove the charge, a thing which would have been easy enough if the statement were false. He passes it over with a cynical comment on the probability of anyone suing for an encumbered estate.⁴ Cyronides, though he had no legal claim to the estate, paid off the debts, and thus cleared his father's name. No estate was handed over to the speaker's mother for the excellent reason that there was no estate to hand over. Aristarchus II was posthumously adopted as the son of his own grandfather and thus the family, from the religious standpoint, was restored. It is obvious that the speaker's mother would have no claim on any fortune that Aristarchus II amassed for himself. Xenainetus II's claim to that fortune, whether or not he had been adopted as the son of his own brother, was good. Aristarchus II, by his adoption, had been made legally brother to his own father; therefore his natural brother Xenainetus II (not counting the latter's adoption) was now legally his nephew. As a result of this adoption the speaker's

¹Isaeus x. 18-21

²Ledl, I, 4-7; Wyse, pp. 655-6; Beauchet, p. 421.

³Isaeus x. 15.

⁴Ibid. 16-17.

mother was now legally sister to Aristarchus II, and her son had a legitimate right to claim the estate in her name, though judgment would surely go against him following the rule $\kappa\rho\alpha\tau\epsilon\acute{\iota}\nu\ \tau\omicron\upsilon\varsigma\ \acute{\alpha}\rho\rho\epsilon\nu\alpha\varsigma$.¹ But the point is that the speaker is trying to reopen the estate of Aristarchus I rather than claim that of Aristarchus II. If Aristarchus I had left any estate, Cyronides was the kléronomos; and the prothesmia allowed diadikasial for an estate only within five years of the death of the kléronomos.² Thus he would have had to claim the estate within five years of the time that Aristarchus II came into possession; which he didn't do for the obvious reason that he had no basis of claim. When the speaker brought the present suit, the Archon knew the law in the matter, and required him to state at his anakrisis that his mother was the sister of Aristarchus II.³ In other words he was taking official cognizance of the lapse of the prothesmia and formally declaring closed the estate of Aristarchus I. If the speaker wished to claim the estate of Aristarchus II, that was his own affair, but he would have to make clear in his claim that this was what he intended to do. The speaker was simply wily enough to accede to the Archon's demand, and trust to luck in renouncing his admission when he came before the jury.⁴

If the anchisteus could not claim back the epikléros, there is, of course, no question of a prothesmia to his right.

(2) When a girl, after the death of her father, having neither brothers nor paternal grandfather, had been previously $\epsilon\gamma\gamma\rho\eta\theta\epsilon\iota\sigma\alpha$ by her father to an outsider, was she epidikos, and

¹Demosthenes xliii. 51.

²Cf. pp. 55-58 infra.

³Isaeus x. 2.

⁴Cf. Wyse, pp. 650-52; E. S. Forster, Isaeus with an English Translation, "The Loeb Classical Library" (London, 1927), pp. 355-7.

could she be claimed and her marriage broken up by the anchisteus through epidikasia? If so, was there any limitation on this right of the anchisteus? Most modern commentators have adopted the view that the next of kin did have this right, basing their opinion on a passage in Isaeus where the speaker says:

τὰς μὲν ὑπὸ τῶν πατέρων ἐκδοθείσας καὶ συνοικοῦσας ἀνδράσι
 γυναῖκας (περὶ ὧν τίς ἂν ἄμεινον ἢ ὁ πατὴρ βουλευσάιτο;) καὶ
 τὰς οὕτω δοθείσας, ἔάν ὁ πατὴρ αὐτῶν τελευτήσῃ μὴ καταλιπὼν
 αὐταῖς γνησίους ἀδελφούς, τοῖς ἐγγύτατα γένους ἐπιδίκους ὁ
 νόμος εἶναι κελεύει, καὶ πολλοὶ συνοικοῦντες ἤδη ἀφῆρηνται τὰς
 αὐτῶν γυναῖκας.

The general assumption seems to be that the law was unfortunate but that it actually existed, and that its workings might have been mitigated by the fact that an epikléros who did not wish to be divorced from her husband could avoid that eventuality by relinquishing her claim to the estate and letting the anchisteus have it.² There are several objections to such a view:³ (1) Such a legal requirement would work in direct contradiction to the law which gave fathers the right to betroth their daughters to whomever they wished. (2) It is unlikely that outsiders would ever be willing to marry girls who had no brothers in the face of a law which would inevitably take their wives from them after the death of the father in case there were any estate worth having. (3) It is hard to reconcile with the analogous situation in which a girl had been betrothed to her anchisteus by her father before his death. It would be out of reason to suppose that after the death of the father, the anchisteus would have to enter an epidikasia for the girl to whom he was already married. Such a procedure would imply the invalidity of the previous *engysis*. (4) The authority for the requirement is one unconfirmed

¹Isaeus iii. 64.

²Cf. *ibid.* x. 19.

³The following conclusions are based largely on the findings of Ledl, I, 14-18.

statement in an author who cannot be trusted too far when he has a point to make.

It is impossible on the basis of our sources to settle this matter finally, but the probability is that in the time of the orators, the law did not permit wives to be taken from their husbands by epidikasia, at least if they had been ἐγγυηθεῖσα by their fathers. The Athenian regard for the dispositions of fathers was extremely strong, and it is unlikely that they would have allowed such dispositions to be set aside regularly by estate seeking relatives. One cannot entirely disregard the statement of Isaeus, but it is to be remembered that it is an isolated ex parte statement. He may be right in saying that "wives had already been taken from their husbands;" but such a circumstance might well have arisen from a misunderstanding of a law, which at best must have been extremely confusing,¹ on the part of the jurors; or from the frivolous attitude of the dikastai. For we are informed that in the later Fifth Century, at least, Athenian juries were inclined to settle epikléros cases as they saw fit with small regard for the legality of the case.² But that such a law was part of the Athenian code is highly improbable. If the above explanation is correct there can be no question of prothesmia.

(3) What becomes of the marriage of an epikléros who has been formally and correctly married to a kinsman by epidikasia, if at a later time some other kinsman comes forward and claims that his right to marry her is better than that of the man who had married her (the ἐπιδικαζόμενος -- that his relationship is

¹Cf. Aristotle *Ath. Pol.* ix. 2: ἔτι δὲ καὶ διὰ τὸ μὴ γεγράφθαι τοὺς νόμους ἀπλῶς μὴδὲ σαφῶς, ἀλλ' ὥσπερ ὁ τῶν κληρῶν καὶ τῶν ἐπικλήρων, ἀνάγκη πολλὰς ἀμφοισθητῆσεις γίνεσθαι.

²Aristophanes *Vesp.* 583-7.

closer? That such a plea would be accepted, up to a certain point, appears from a law cited in Demosthenes¹ which gives directions for the ἀμφοβήτησις τοῦ κλήρου καὶ τῆς ἐπικλήρου. In this passage the statement is made that any person may be summoned to defend himself in a diadikasia "ὅ ἂν ἡ προθεσμία μήπω ἐξήκῃ." Now since this passage deals with both κλήρος and epikléros, it would be natural to assume that the prothesmia was the same in both cases. But this cannot be the case; for in disputes over inheritances, as is shown later,² the law provided that the estate might be claimed at any time within the lifetime of the κληρονόμος and for five years after his death. In the case of the epikléros, however, the Athenian law cannot have allowed a woman to be an object of litigation all her life as such a prescription might make her. Furthermore, the death of the ἐπιδικαζόμενος would dissolve the marriage, and the foolishness of suing his heirs for possession of the epikléros scarcely needs a demonstration. If on her husband's death she already had a son who could fulfill the obligations of a son to his maternal grandfather, she was no longer epikléros,³ and her son would be her guardian. If she had no son she would revert to her original condition and would be the object of epidikasia just as if she had never been married.⁴ Therefore the prothesmia can not have been the same as in cases of inheritance, and the law which Demosthenes quotes must mean "the particular prothesmia applying in either case." What, then, are we to assume as the length of time during which an epikléros could be claimed from her husband by one whose right was better? Perhaps the most satisfactory explanation is that the woman ceased to be epidikos when a legitimate

¹Demosthenes xliii. 16.

²Cf. pp. 55-57 *infra*.

³Beauchet, p. 423.

⁴Caillemer, *Prescription*, pp. 17 ff.

male child was born; until that time she could be claimed by any relative who could convince the jury that he had a better right. In the first place it has already been shown that the whole purpose of the epikléros institution was to provide a son to succeed his maternal grandfather.¹ When that had been accomplished the woman would naturally cease to be epikléros. The case of the adopted son is analogous to this: a person who had been adopted into a family could freely leave that family and return to his natural οἶκος if he left behind him a son of his own blood to take his place in the adoptive household.² The only interest of the law was to provide an heir to the adoptive father. The same general principle would seem to have been in force in the case of the epikléros; there would be no purpose in allowing other kinsmen to claim the epikléros after the purpose for which the institution existed had already been fulfilled.

If, however, no son was born of the union because of the impotence of the husband, the girl was authorized³ to leave her husband and marry another within the prescribed limits of kinship in order that there might be a son. Any purely temporal limitation would: (1) in case there was a son born before the time had elapsed, allow suits that were entirely superfluous and prejudicial to the interests of the epikléros; (2) in case no son had been born, it would appreciably lower the chances of the purpose ever being fulfilled, for after that time the epikléros could not marry another though she were childless and her husband impotent.⁴

¹Demosthenes xlii. 12. ²Ibid. xliv. 33, 64.

³Plutarch Vita Solon. 20.

⁴This is the view of Caillemer, Succession, pp. 42-43; Hafter, p. 55; Lécrivain, "Epicleros," in Daremberg-Saglio, Vol. II; and apparently Lipsius, p. 545 n. 20. Opposed is Beauchet, pp. 449-50, who believes the prothesmia was for the usual five years. Hruza, p. 111 n. 37, and Wyse, p. 333 take no definite stand.

The most important point is that the epikléros is not merely a $\alpha\lambda\eta\rho\omicron\varsigma$; no matter how similar many of the legal processes connected with the two are, the epikléros is the holder of a religious and legal trust; and any theory that fails to take into consideration the peculiar nature and requirements of this trust neglects the most important aspect of the whole problem.

Public Arbitration

One of the most important legal innovations at the time of the archonship of Eucleides was the institution of compulsory public arbitration in most civil cases.¹ The list of arbitrators ($\delta\iota\alpha\iota\tau\eta\tau\alpha\iota$) consisted of all the citizens holding no public office at the time, who had just passed the age of military service, i.e. were in their sixtieth year.² It was the duty of the Forty to take the list of all men who were subject to service as arbitrators and allot them into ten panels, each of which arbitrated the cases for one tribe.³

If a suit for more than ten drachmas was entered before the Forty, they turned it over to an arbitrator selected by lot from the panel which arbitrated cases for the defendant's tribe. It was the duty of the arbitrator to try to reconcile the disputants;⁴ if he failed in this, he heard all the evidence, saw copies of all laws and decrees cited, and then rendered his decision under oath.⁵ If both parties agreed to accept the decision, the case was at an end. If either party were dissatisfied, he was

¹General discussion of arbitration: H. C. Harrell, Public Arbitration in Athenian Law, "University of Missouri Studies," Vol. XI, No. 1. For date: Bonner and Smith, I, 348 ff. For competence: ibid., II, 97 ff.

²Aristotle Ath. Pol. liii. 4.

³Demosthenes xlvii. 12. Lipsius, p. 227.

⁴Ath. Pol. liii. 1-2. ⁵Ibid. lv. 5. Harrell, p. 39.

entitled to appeal it to a court by announcing to the arbitrator and his opponent, at the time the award was made, his intention of appealing. That the announcement of the appeal had to be immediate follows from the fact that the only evidence which could be used before a law court were those documents and depositions which had been submitted to the arbitrator, and which the latter, when informed of the appeal, placed, together with a tablet on which his own judgment was written, in two boxes (one for each disputant), sealed, and sent to the members of the Forty for the defendant's tribe.¹ If the disputants had agreed to abide by the decision the documents would either be destroyed or returned to the parties which had submitted them; at any rate they would not be in sealed boxes in the possession of the Forty, and the case would be closed beyond any change of heart on the part of the loser.² Thus one might say that the prothesmia for appeals from arbitration was immediate.

When the arbitrator was ready to give his verdict, he set a day (ἡ κυρία)³ on which both disputants were required to be present. If one party failed to appear without having previously had the judgment postponed or submitting an affidavit that he could not be present, the judgment was rendered against him in default (τὴν ἔρημον or ἔρημην).⁴ The only remedy against a verdict thus given was to bring the suit δίκη μὴ οὔσα claiming that the judgment had been wrongly given in default after the absent party had submitted an affidavit or was unavoidably absent. If

¹Aristotle *Ath. Pol.* liii. 2: παραδιδόσσι τοῖς δ' τοῖς φυλῇν τοῦ φεύγοντος δικάζουσιν.

²Demosthenes xl. 31: ὡς οὗτος παρὼν ὅτε ἀπεδιήτησέ μου ὁ διαιτητής, οὔτε ἔφηκεν εἰς τὸ δικάστηριον ἐνέμεινέ τε τῇ διαίτῃ.

³Demosthenes xlix. 19; xxi. 84.

⁴*Ibid.* xxxix. 37.

this suit were successful the original case reverted to the arbitrator. The prothesmia for the δίκη μὴ οὔσα was ten days.¹

Analogous to this procedure was the action used when a verdict in default was given in a law court. The same grounds, illness or unavoidable absence, were the basis of the plea for reversal which in this case was called τὴν ἐρήμην δίκην² or simply τὴν δίκην ἀντιλαχεῖν. The prothesmia for this suit was two months.³

Euthyna

The Athenians felt that the very cornerstone of their democracy was the accountability of public officials⁴ and as a result they devised numerous and frequent checks to test the honesty and competence of officers of the state. These included an audit in every prytany;⁵ the epicheirotomia (practically a vote of confidence) in each prytany;⁶ a final audit on leaving office;⁷ and a short period after leaving office during which any citizen

¹Demosthenes xxi. 90; Lex. Cant. s.v. μὴ οὔσα δίκη; Pollux viii. 60: ἡ δὲ μὴ οὔσα δίκη οὕτως ὀνομάζετο· ὁπόταν τις παρὰ διαιτητῆς παραγραφάμενος καὶ ὑπομοσάμενος νόσον ἢ ἀποδημίαν εἰς τὴν χυρίαν μὴ ἀπαντήσας ἐρήμην ὄφλη, ἐξὴν ἐντὸς δέκα ἡμέρων τὴν μὴ οὔσαν ἀντιλαχεῖν καὶ ἡ ἐρήμη ἐλύετο ὥς ἐξ ἀρχῆς ἐλθεῖν ἐπὶ διαιτητὴν. εἰ δὲ μὴ ἔλοι τὴν μὴ οὔσαν ὁμόσας μὴ ἐκὼν ἐκλιπεῖν τὴν διαίταν, κύρια τὰ διαιτηθέντα ἐγένετο. ὅθεν ἐγγυητὰς καθίστασαν τοῦ ἐκτίσματος.

²Demosthenes xxxii. 27.

³Pollux viii. 61: ἀντιλαχεῖν δὲ δίκην ἐξὴν ὁπότε τις μὴ παρὼν ἐν δικαστηρίῳ κατακηρυχθεὶς καὶ μὴ ὑπακούων ἐρήμην ὄφλοι. ἀντιλαχεῖν δὲ ἐντὸς δύο μηνῶν ὑπῆρχεν. εἰ δὲ μὴ τοῦτο σχοίη τὸ ἐγγεγραμμένον ὄφλε καὶ ἀτιμος ἦν.

⁴Aristotle *Polit.* ii. 9. 4: ἐπεὶ πολλῶν γε ἔοικε τὴν ἀναγκαιοτάτην ἀποδίδοναι τῷ δήμῳ δύναμιν, τὸ τὰς ἀρχὰς αἰρεῖσθαι καὶ εὐθύνειν.

⁵*Ibid.* *Ath. Pol.* xlvi. 3; Lysias xxx. 5; Gilbert, pp. 223-4; Lipsius, p. 102.

⁶*Ath. Pol.* xliii. 4; lxi. 2.

⁷*Ibid.* liv. 2; Lipsius, pp. 102-5.

might bring forward an indictment.¹ Besides these regular methods, an eisangelia (impeachment) might be brought against any official during his term of office by anyone who charged him with malfeasance.²

In most of the above mentioned procedures there can be no question of prothesmia; the audits and the epicheirotomia took place at a particular time; if one wished to make a charge at another time, he would have to do so by means of eisangelia. Only the γραφή ἀλογίου and the period of responsibility after the audit need concern us here.

The final εἴθυνα (audit) took place within the first month of the Athenian year³ and an official who failed to give his account within this time was liable to prosecution by an ἀλογίου γραφή.⁴ It was illegal for an official who had failed to give an audit to leave the city or dispose of his property,⁵ and it is probable that some legal procedure such as the phasis could

¹Aristotle Ath. Pol. xlviii. 4.

²Ibid. xlv. 2; Bonner and Smith, I, 298 ff; Lipsius, pp. 198-200.

³The accounts were audited in thirty days (Harpocration, Suidas, s.v. λογισταί). This is not a prothesmia, but a period of grace analogous to that given a debtor.

⁴Lex. Cant. s.v. ἀλογίου γραφή. Pollux viii. 54; Suidas, Hesychius, s.v. ἀλογίου. Naturally the γραφή ἀλογίου could not be used until the thirty days had passed, for that much time was granted the official. Lipsius (p. 398) confines this suit to officials who had handled public funds, leaving the eisangelia as the only procedure against other officials who had not rendered an account. It is hard to believe that the Athenians would have been without any regular process against an offense so inimical to the spirit of a democratic state, and that they should have been forced to use a procedure designed chiefly for offenses not covered by laws (Pollux viii. 51). After all, the lexicographers are divided as to whether handling of public funds was essential to the application of the γραφή ἀλογίου; and even a man who had handled no money gave a λόγος (Aeschines iii. 22), so the name of the suit is no bar, since ἀλογίου is the crime of not giving a λόγος.

⁵Aeschines iii. 21.

be used against him for so doing;¹ but there is no evidence that any such action was ever used, and since the γραφή ἀλογίου would also cover the offense, one may assume that it was the more convenient method.²

Our information on the γραφή ἀλογίου is very scanty, being derived entirely from a few references in the lexicographers, and it is impossible to say with any certainty whether its application was limited by a prothesmia. It seems improbable, though, that the Athenians would let an ex-official off with no euthyna at all, no matter how late an accusation might be brought against him. A prothesmia is understandable in certain other graphai, such as the graphé paranomon, or in accusations brought before the Euthynos, where there was a question of the disputed legality or advisability of certain definite acts; it would be unwise to leave them unlimited, and thus a field for sycophants. But the graphé alogiou would be used against violations of the most important principle of democracy, the accountability of officials, and the question of whether or not an euthyna had been given would be easily capable of proof. Any prothesmia on such actions would give officials an opportunity for permanently avoiding their euthyna. This is especially true since there would frequently be no incentive for citizens to enter the suit.

¹There would be no other way to enforce the specific provisions mentioned by Aeschines. The official's property was not his own to do with as he wished: it was, in a way, pledged to the state as security for any possible fines. An attempt to dispose of it would constitute illegal handling of state's property, and φάσις was the suit for recovering such property in private hands (Harpocration, s.v. φάσις; Lipsius, p. 309 ff).

²Pollux viii. 45 says: ἡ δὲ εὐθυνα χρόνον εἶχεν ὀρισμένον μεθ' ὃν οὐτ' ἐτ' ἐξὸν ἐγκαλεῖν, but he is undoubtedly referring to the private procedure before the Euthynos (pp. 48-49 *infra*). He cannot mean that euthynai could only be given within thirty days and that after that the official went free; Aeschines, for example, gave his euthyna for the embassy after that period (Demosthenes xix. Cf. Kennedy, II, 119).

There were ten officials, known as Euthynoi (εὐθύναι), one elected by lot from each tribe.¹ Each Euthynos sat with his two assistants (ἀντιέδοροι) before the statue of the eponymous hero of his tribe on market days.² It was the right of any citizen to bring before his tribal Euthynos a civil suit or a criminal charge within three days of the time the official had passed his final audit.³ The Euthynos, together with his assistants, examined the accusation; if he accepted the charge, it was sent to the Forty if a private suit; to the Thesmothetae if public. It was then tried before a law court in the regular fashion.⁴ These were the dikai and graphai περὶ τῶν εὐθύνων, and the prothesmia was three days.

Demosthenes' speech against Aeschines for treason on an embassy (περὶ παραπροσβείας) seems to have been delivered in a γραφή περὶ τῶν εὐθύνων but the fact that it takes place so long after the embassy is rather disconcerting, since it is clearly stated that the prothesmia was three days. The procedure in this

¹Aristotle Ath. Pol. xlviii. 4.

²Cf. Lipsius, p. 105 n. 208.

³All editions now read ἐν τῷ γ' ἡμέρων in Ath. Pol. xlviii. 4. Lipsius (p. 105 n. 208, and p. 853) suggests ἐν τῷ λ' ἡμέρων; Kenyon in his 5th edition admits "potest etiam λ' legi." U. von Wilamowitz-Moellendorf (Aristoteles und Athen [Berlin, 1893], II, 325, n. 15) prefers γ' but for an invalid reason as he holds that the Euthynoi were a committee of the Council and could not be spared for more than three days. Lipsius (p. 101 n. 190) points out the incorrectness of this reasoning. A. Böckh (Die Staatshaushaltung der Athener 2nd ed., [Berlin, 1851], II, 268) thought that the officials were subject to complaints for thirty days after their retirement, but writing before the discovery of Ath. Pol., he was apparently confusing this period with the thirty days granted the officials for giving their euthynai. On the whole three days seems more satisfactory, not only on palaeographic grounds, but because thirty days would be a very long period of probation after so many opportunities had been given ὁ βουλόμενος to prosecute. This is the process referred to in Pollux viii. 45 (quoted p. 47, n. 2 supra) and Andocides i. 78: γραφαί. . . περὶ τῶν εὐθύνων.

⁴Ath. Pol. xlviii. 5.

case is somewhat complicated, but may be reconstructed as follows: When the second embassy returned from Macedonia, Demosthenes intended to give his account, but Aeschines blocked this by going before the Logistae and claiming that Demosthenes was no longer *ὁπεύθυνος* since he had already given an account¹ (for the first embassy). This made it embarrassing for Demosthenes to try to prosecute Aeschines for failing to give his account. At a later date Demosthenes did, however, submit to his *euthyna*.² Exactly what procedure followed is not certain, but a threat of a *γραφὴ ἀλογίου* may have forced Aeschines to give his own *euthyna*. Thereupon Demosthenes and Timarchus brought an accusation against him.³ That this was in the form of a *γραφὴ παραπρεσβείας* filed before the *Euthynos* rather than an accusation in the court of the Logistae seems likely from the fact that the competence of the Logistae was limited to financial transactions.⁴ Aeschines got rid of one prosecutor, Timarchus, by a prosecution for immorality;⁵ this action held up the original suit, but the case finally came to court three years after the embassy had returned.⁶

The Summary Procedures

Apagogé (*ἀπαγωγή*), *endeixis* (*ἐνδειξις*), and *ephegesis* (*ἐφήγησις*)⁷ were three closely connected (and occasionally confused)⁸ judicial shortcuts whose purpose was to provide summary action against certain classes of lawbreakers at the very time

¹Demosthenes xix. 211.

²*Ibid.* 335.

³*Ibid.* 2.

⁴Aristotle *Ath. Pol.* liv. 2.

⁵Demosthenes xix. 2, 283 ff.

⁶Dionysius of Halicarnassus *Epist. ad Amm.* i. 10.

⁷Lipsius, pp. 317-38; H. Meuss, *De ἀπαγωγῆς actione apud Athenienses* (Breslau, 1884).

⁸E.g. Antiphon v. 9.

of the offense,¹ and whose chief characteristics were the absence of πρόσκλησις² and the requirement that the accused be kept in custody until his trial unless he could furnish three sureties of the same property class.³

The operation of the *apagogé* may be summarized as follows: the accuser himself arrested the offender and took him before the proper official.⁴ The *apagogé* was used against vulgar criminals caught in the act,⁵ in which case the penalty was death; against ἄτιμοι making use of forbidden rights;⁶ and against foreigners and slaves charged with any serious crime.⁷

In the *endeixis*, the accuser laid an information before the proper official⁸ who took the offender into custody.⁹ The process was used almost exclusively against ἄτιμοι for usurping civil rights.¹⁰

The *ephegesis* (which is rarely mentioned) was a variation of the *apagogé* in which the accuser led the competent official¹¹

¹Demosthenes xxiii. 80: εἰ . . . ὁρᾷ . . . ἀπάγειν ἔξεστιν εἰς τὸ δικάστηριον.

²Lipsius, p. 317; Meuss, p. 12.

³Demosthenes xxiv. 144-5.

⁴Ibid. xxiii. 80. The Eleven (Aristotle *Ath. Pol.* lii. 1; Demosthenes xxiv. 146) or the Thesmothetae (Lycurgus *In Leocr.* 121). Gilbert (p. 431, n. 1) believes that *apagoge* for murder against citizens of allied cities went before the ἐπιμεληταί. Cf. Antiphon v. 17. *Contra*, Lipsius, pp. 74-75.

⁵*Ath. Pol.* lii. 1; Antiphon v. 9; Lysias xiii. 85.

⁶Demosthenes xxiii. 80; xxiv. 105; liii. 14.

⁷Glötz, *Solidarité*, pp. 425-6.

⁸Either the Eleven or the Thesmothetae: *Ath. Pol.* lii. 1; Demosthenes xxiv. 22, 146.

⁹Lipsius, p. 331.

¹⁰Demosthenes xxiv. 22; *Schol. Bav. ad Demosthenes* xx. 156; Harpocration, s.v.; Suidas, s.v. ε.

¹¹Demosthenes xxi. 26; Lipsius, p. 337.

to the spot to arrest the accused.

That these procedures were intended to be used at the very time of the illegal act itself is clear from the names, the abbreviated forms, and from the insistence upon ἐπ' αὐτοφώρῳ in the apagogé against vulgar criminals;¹ the use of apagogé in other connections is a development of the latter.²

There would be no *raison d'être* for a prothesmia in connection with either procedure in its original form, for the arrest, either by apagogé or endeixis, would follow immediately upon the illegal act. In the fourth century, however, they were both used somewhat loosely; apagogé and endeixis became written complaints³ and ἐπ' αὐτοφώρῳ was twisted to mean nothing more than φανερόν.⁴ Under these circumstances both procedures would tend less to be shortcuts and become more like ordinary graphai: thus it is conceivable that some time might elapse between the illegal act and the arrest.⁵

In spite of this it is highly improbable that any prothesmia ever formally limited the right to enter the apagogé or the endeixis. We have seen that none would have been practicable in the beginning, and it would have been unlike the Athenians to take official cognizance of the gradual change in the institution by a later psephism limiting its use to a certain time. Even the hardest sycophant would hesitate to use such legal shortcuts

¹Lysias xiii. 85.

²ἀπαγωγὴ κακοδέρων is the only type mentioned by Aristotle (*Ath. Pol.* lii. 1) and Harpocration, s.v. ἀπαγε. Lipsius, p. 320.

³Demosthenes lviii. 1, 5; *Lex Seguer.* v. 404. 19.

⁴Lysias xiii. 85; Meuss, p. 15.

⁵Demosthenes liv. 1; Meuss, p. 18. In the Agoratus case the defendant was brought to trial about five years after the supposed offense. This is hardly to be regarded as a typical case of apagoge, however; it was political in its import and an outgrowth of the bitter factionalism of the Reign of Terror.

after any considerable lapse of time, so there would scarcely be any occasion to invoke the general five year prothesmia.¹ In all probability popular feeling was sufficient to confine the use of apagogé and endeixis to a reasonable period of time, except in such cases as that of Agoratus. In the latter Agoratus was being tried for having been an informer of the Thirty, and the means employed to bring him to trial were undoubtedly immaterial to everyone but Agoratus himself. Even in that case, however, the insistence of the magistrate on the insertion of the words ἐπ' αὐτοφώρῳ in the plaint² shows that he, at least, had some doubts as to the admissability of the case.

¹Theoretically a person might enter an apagogé or endeixis after a lapse of more than five years. Improbable as this is, it is even less conceivable that a magistrate, under ordinary circumstances, would accept such a plaint.

²Lysias xiii. 85.

CHAPTER II

USUCAPION

Prescription, as has been pointed out,¹ is the acquisition or extinction of rights through the lapse of time; usucapion is purely acquisitive; it is a legal means of mending a defective title to property through the passage of time, and the term may be used to distinguish that prescription which is positive in its action and establishes a clear title to property, from that purely negative type which has been under discussion so far. The principle in the Roman and modern legal systems is that continued undisputed possession of property eventually gives the possessor a clear title, on the supposition that a real owner will claim his property within a reasonable period of time.

Whether the legal system of Athens recognized the principle of usucapion is a moot question.² Certain it is that no claim to usucapion as such nor any laws governing its application are preserved in the sources. Isocrates, however, shows that its philosophy, at least, was not unknown: ἀλλὰ μὴν οὐδ' ἕκαστον ὑμᾶς λέληθεν ὅτι τὰς κτήσεις καὶ τὰς ἰδίας καὶ τὰς κοινὰς ἂν ἐπιγένηται πολὺς χρόνος, κυρίας καὶ πατρώας ἅπαντες εἶναι νόμιζουσι.³ He goes on⁴ to apply this principle to the demand of the Thebans

¹Pp. 1-2 supra.

²Cf. Caillmer, Prescription, pp. 7-8; G. A. Leist, Der Attische Eigentumstreit im System der Diadikastien (Jena, 1886), pp. 60-61; K. F. Hermann, Disputatio de vestigiis institutorum veterum, imprimis Atticorum, per Platonis de legibus libros indagandis (Marburg, 1836), p. 66; Lipsius, pp. 675-6.

³Archidamus 26.

⁴Ibid. 28.

that Sparta give up Messene which she had possessed for centuries, thus implying that it was a principle of "international law."

Plato, in his Laws,¹ after repeating that in his State houses and land shall be inalienable² and that therefore no disputes about them may arise, proceeds to describe an elaborate system of usucapion whose period is to vary from one to ten years according as the article in question is used openly or secretly, in the city or in the country. That Plato's particular provisions are his own invention is generally accepted;³ it seems probable, however, that the principle of usucapion was not his work but was taken from the law code of Athens itself.⁴ Leist, however, denies the existence of any usucapion whatsoever.⁵ He quotes Plato's statement that there can be no dispute concerning houses and lands because they are inalienable, as evidence that the whole passage must apply to Plato's State only; but it scarcely proves this. It can be cited quite as easily as evidence that Plato, after disposing of the difference between his State and Athens (the inalienability of real property in the former) goes on to cite the correspondences between the two states.⁶

Leist says further: "Wenn man bedenkt dass im positiven

¹954 C-D.

²Caillemer (Prescription, p. 8) interpreted this to mean that real property was inalienable at Athens, mistranslating τῆδε in χωρίων μὲν οὐκ ἐστὶν τῆδε οὐκ ἔστι ἀποιοσθήναι. That τῆδε means "in the ideal State" has been pointed out frequently; e.g. Leist, pp. 60-61; Lipsius, p. 676, n. 5; R. G. Bury, Plato with an English Translation, "The Loeb Classical Library," Vol. X, "The Laws" (London, 1926), ad loc.

³Lipsius, p. 676, n. 5; Caillemer, Prescription, p. 8; Hermann, p. 66.

⁴Caillemer, ibid.; Lipsius, ibid.

⁵Loc. cit.: "Im Gegensatz zu der Formalacten der Eigentumübertragung fehlt den Athenern die Usucapion."

⁶Lipsius, p. 676, n. 5.

Recht der Athener das Recht eines noch angefochten werden konnte, nachdem er auf Grund des archontischen Zuspruchs dreiundzwanzig Jahre besessen hatte, wird man kaum noch ein Bedürfnis fühlen die Usucapion in das Attische Recht hineinzutragen." But this rather proves the opposite. His reference is apparently to the inheritance cases in Isaeus' third and fifth speeches. Now in inheritance cases the Athenian law provided that there should be no prothesmia during the lifetime of the κληρονόμος, but that it should run for five years after his death and thereafter protect his heirs.¹ This must be regarded as a type of usucapion since its effect was not merely to bar actions, but also to guarantee the possessor's title after a definite lapse of time: i.e. the lifetime of the kléronomos plus five years. So no matter how many years have elapsed between the kléronomos' receiving of the estate and the raising of the claim against him, no principle of usucapion was violated as long as the claim was brought within the required period: lifetime of the kléronomos plus five years. In both the Isaeus speeches mentioned above this is the case. Thus Leist's arguments work against him.

Altogether, though our information is scanty and in most cases we have no knowledge as to details, it seems safe to conclude that the Athenian system did recognize usucapion as a means of acquiring clear title, and that the individual provisions may have been similar to those of Plato.

Inheritance cases.-- As has just been pointed out, the prothesmia in inheritance cases is to be regarded as a type of usucapion. The law was this: there was no limitation within the lifetime of the original receiver of the inheritance (κληρονόμος); the prothesmia started to run with his death, and was for five

¹Cf. inheritance cases, infra.

years as usual. After that his heirs were protected. In other words, disputes over an inheritance (διαδικασίαι) were permitted against the original receiver of the inheritance throughout his lifetime, and against his descendants for five years.

The simplest statement is in Isaeus' speech on the estate of Pyrrhus: ὁ δὲ νόμος πέντε ἔτων κελεύει δικάσασθαι τοῦ κλήρου, ἐπειδὴν τελευτήσῃ ὁ κληρονόμος.¹ This is corroborated by a law quoted in Demosthenes which, after detailing the procedure to be followed in a suit for recovery of a wrongfully adjudicated inheritance (without any mention of prothesmia) states: ἔδν δὲ μὴ ζῆν ὁ ἐπιδικαζόμενος τοῦ κλήρου, προκαλείσθω κατὰ ταῦτα ᾧ ἂν ἡ προθεσμία μὴπω ἐξήκῃ.²

That no prothesmia protected the original inheritor is clearly indicated by the Isaeus passage cited above, and by the relatively large number of diadikasiai which we know to have taken place a great many years after the original adjudication of the estate without the prothesmia having been invoked by the defendants.

Isaeus' speech on the estate of Dicaeogenes was given in a suit twenty-two years after the original settlement.³

The speech against Leochares was spoken many years after Leocrates had taken possession of the estate of Archias;⁴ no question of prothesmia was raised.

In the speech on the estate of Pyrrhus we learn that the present trial⁵ arises from litigation over an estate which had never been disputed during the more than twenty years that the kléronomos had possession of it, but only after the latter's

¹Isaeus iii. 58.

²Demosthenes xliii. 16.

³Isaeus v. 7, 35.

⁴Demosthenes xliv. 20.

⁵Isaeus iii. 1-2.

death.¹

This evidence is quite clear and incontrovertible, and no objections based on the sources have been made to the prothesmia described above. Some,² however, have objected to the principle of the law, on the ground that any prothesmia should start with the death of the legator rather than that of the legatee. Hermann sought to explain the Athenian inheritance regulation by stating that the receiver of an inheritance might always be considered malae fidei possessor toward those who had a better claim than he.³ This fails to explain anything; the same might be said as truthfully of anyone retaining possession of an object to which another claims a better right, whether an inheritance or not. But there is a prothesmia in these other cases, and none in the case of an inheritor.

The best explanation seems to be that it was a measure of protection for those possibly closer heirs who might not yet have reached their majority at the time the estate was adjudicated. It is quite possible that a number of people could have a better right than the kléronomos; those of legal age, however, might be unwilling to resort to litigation, or might have been "persuaded"

¹Caillemer (Prescription, pp. 15-16) mentions Isaeus x as an example of a suit taking place long after the original adjudication of the estate. But see pp. 35-38 supra.

²Caillemer (Prescription, pp. 13-14) says: "Il y a là, sans doute, quelque chose qui heurte nos idées modernes. Qu'importe, en effet, le décès de l'héritier? N'est-ce pas seulement du jour de l'ouverture de la succession qu'il faut se préoccuper? C'est à cette époque que s'ouvrent les droits de successibles; c'est, par conséquent, à partir de cette époque qu'ils peuvent agir, et la prescription, peine de leur inertie, doit immédiatement commencer." But this leads him to no conclusion. Platner (quoted by Caillemer, p. 14) changed κληρονόμος to κληροδότης, thus making the prothesmia run from the death of the original legator. This is unnecessary, as the law is understandable as it stands, and is untenable on philological grounds, since κληροδότης must mean one who bequeaths by will. Caillemer, loc. cit.

³K. F. Hermann, Privatsalterthümer (Heidelberg, 1852), p. 331. Quoted in Caillemer loc. cit.

to forego their rights by the illegal recipients of the estate. It is perfectly equitable that a prothesmia should limit their right of action. But there might be other heirs, who at the time of the adjudication, or even for five or more years after, were not of legal age, and therefore could not contest it.¹ The usual five year prothesmia would be manifestly unfair to them, as it would prevent them from ever exercising their right to contest the estate.

None the less there had to be some limitation; it was obviously impossible to keep an inheritance open indefinitely; such a principle carried to its obvious extreme would permit suits for an estate ten generations after its original settlement, which would be as unfair to the heirs of the kléronomos as the five year prothesmia would have been to minor heirs of the legator. It goes without saying that the difficulties in the way of any kind of settlement would have been insurmountable.² It was necessary to strike some compromise. It was undoubtedly felt that the absence of prothesmia during the lifetime of the kléronomos was adequate protection for the possible minor heirs; whereas the five year prothesmia beginning with the kléronomos' death would protect his heirs.

It was contrary to the religious and social ideas of the Athenians that the state should ever acquire an estate through lack of inheritors to claim it. In the first place, there is the obvious fact that an estate of any size at all would be sure to be the object of claims, probably by a good many people in no

¹A minor could, of course, claim an estate through his epitropos; but since an epitropos was normally a close relative and therefore a possible claimant of the estate in his own right, the need for protecting minor heirs was not obviated.

²Cf. statement on philosophy of prothesmia, Demosthenes xxxvi. 27, quoted p. 3 supra.

wise entitled to it.¹ Direct heirs, of course (i.e. son, grandson, etc.). had no choice but to accept an inheritance, no matter how encumbered it might be.²

The true reason why there was no reversion of inheritances to the state is to be found in the Athenian religious objection to letting a family die out.³ The Archon was charged with general supervision of family matters,⁴ and specifically with the duty of seeing that no family should be allowed to die out. This is brought out in the following passage from the speech on the estate of Apollodorus: δι' ὃ καὶν ἄπαιδες τελευτήσωσιν, ἀλλ' οὖν ποιησάμενοι καταλείπουσι. καὶ οὐ μόνον ἰδίῃς ταῦτα γινώσκουσιν, ἀλλὰ καὶ δημοσίῃς τὸ κοινὸν τῆς πόλεως οὕτω ταῦτ' ἔγνωκε· νόμῳ γὰρ τῷ ἄρχοντι τῶν οἴκων ὅπως αὖν μὴ ἐξερημῶνται προστάττει τὴν ἐπιμελείαν.⁵ And in a law quoted in the Makartateia: ὁ ἄρχων ἐπιμελείσθω τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων καὶ τῶν οἴκων τῶν ἐξερημυμένων.⁶

It was apparently the duty of the Archon, in case there were no relatives to inherit (and even more important, to carry on the family cult) to select some citizen to fill this function and to adopt him into the deceased's family.⁷

How much time would have to elapse after an estate had become vacant and been left unclaimed, before it devolved upon the Archon to find and εἰσποιεῖν an inheritor? We have no means of judging. Possibly the usual five year prothesmia applied here. It would probably be considered advisable to protect such possible heirs as might at the time be resident abroad.

¹Isaeus iv. 7-9. ²Caillemer, Succession, pp. 149-55.

³Cf. p. 33 n. 2 supra. ⁴Aristotle Ath. Pol. lvi. 6-7.

⁵Isaeus vii. 30. ⁶Demosthenes xliii. 75.

⁷Caillemer, Succession, pp. 132-4.

CHAPTER III

WORKING OF THE PROTHESMIA

Application.-- If a suit which obviously violated the statute of limitations was entered before a magistrate, it could, of course, be thrown out of court. There is no reasonable doubt that at the anakrasis¹ the presiding magistrate had the right to reject complaints which were clearly illegal or incorrect.² A complaint might thus be rejected because the magistrate before whom it was entered realized that he had no jurisdiction in the case; because it was in the wrong form; because the plaintiff was personally debarred from suing; or for several other reasons. If the wording alone were incorrect, he could order changes to be made; but even this implies a right to reject the suit if the required corrections were not made. Thus in the Choreutes murder case, the King Archon refused to accept a charge of homicide because it was entered too late to be properly tried within the current civil year.³ In the Agoratus case, the Eleven, as a condition of their accepting Dionysius' *apagogé*, forced him to add the words *ἐκ'*

¹Cf. Bonner and Smith, I, 289 ff., on duties of magistrates at anakrasis.

²Lipsius, pp. 818-9; Calhoun, "Athenian Magistrates and Special Pleas," CP, XIV (1919), 340 n. 1, 343-5. Contra, L. Beauchet, "Praescriptio," in Daremberg-Saglio, Vol. IV; Caillmer, *Prescription*, pp. 22-23. By way of comparison with modern practice, see "The Statute of Limitations (United States)," *Encyclopaedia Britannica* (14th ed.), Vol. XXI: "A difference of opinion exists in the state courts as to whether the statute of limitations must be specially pleaded in order to be available as a defense. A few states take judicial notice of the running of the period, but most states insist that the defendant must expressly claim the benefit of the statute."

³Antiphon vi. 41-42. Cf. pp. 31-32 *supra*.

ἀποφῶρον to his plaint: these words made an ἀπαγωγὴ κακούργων of the case, and the Eleven refused to accept any other kind of ἀπαγωγή.¹ There is even one case in which the Archon seems to have ordered a change for the reason under discussion, the lapse of the prothesmia. This is the suit for the estate of Aristarchus; the Archon forced the speaker to make a statement at the anakrisis which was an admission that the estate of his grandfather, for which he had hoped to sue, was closed by reason of the prothesmia.²

In the vast majority of cases, however, the magistrate would not feel justified in rejecting a suit on his own authority.³ Unless the inadmissibility of the suit were quite apparent, he would be inclined to leave it to the defendant to raise objections. After all, he had to answer in his euthyna for all his official acts⁴ and would not care to incur any unnecessary danger by attempting to decide disputed matters on his own judgment.

¹Lysias xiii. 85. Cf. Meuss, pp. 30-32. Glotz, *Solidarité*, p. 431 n. 3. In Lysias xvii. 5, the magistrates seem to have rejected a case on their own authority.

²Isaeus x. Discussed at length pp. 35-38 *supra*.

³Beauchet, "Praescriptio," in Daremberg et Saglio, cites the Apaturius case and the failure of the magistrate to reject the suit on the basis of the prothesmia as evidence that he had no power to do so. However, it is not at all certain that the prothesmia was one of the points on which the paragraphe was based. The speaker does not mention it when he gives his reasons for the paragraphe (Demosthenes xxxiii. 3); when he does mention it (27), he does so rather apologetically, and says that he does not rest his case on it. Perhaps he is merely citing it as a τέκμηριον. But the real point at issue is whether or not the speaker was a surety for Parmeno (22); and in our ignorance of the allegations of the plaintiff we have no right to assume that the applicability of the prothesmia was an obvious and undisputed fact. If the point actually came up at the anakrisis and the magistrate took cognizance of it, he undoubtedly accepted it as an issue of fact tendered by the defendant.

⁴Antiphon vi. 43, where the speaker seeks to prove the correctness of the King's rejecting a case by the fact that his (the speaker's) opponents did not attack the official at his euthyna.

The paragraphé was the usual form of objection by a defendant. It consisted of one or more issues of fact tendered by a defendant to prove that the suit was inadmissible: *μη εἰσαγώγιμος*. The effect of the paragraphé was to postpone the trial of the main suit until the paragraphé had been tried. The latter trial took place before the magistrate who had accepted the original suit, and the original defendant spoke first.¹ If the jury sustained the paragraphé, the original suit was thrown out of court and could not be reinstated unless the objection had been merely interlocutory, and then only after the necessary changes in the plaint had been made. If the paragraphé were not upheld, the original suit went forward. The prothesmia is offered as a bar in three cases: Phormio vs. Apollodorus,² the Apaturius case,³ and the Nausimachus-Xenopeithes case.⁴ In all three the objection is raised by means of paragraphé.⁵

In the extant speeches the prothesmia is never offered as the sole basis of objection, partly because of some vague feeling that a man ought to fulfill his obligations in spite of the lapse of time,⁶ partly because it was felt advisable, in case of a special plea, to give as many reasons as possible. Thus in the speech for Phormio, a claim of release is joined to that of prothesmia;⁷ in the Apaturius case, incorrect plaint and release;⁸

¹Isocrates xviii. 2.

²Demosthenes xxxvi. 26-27.

³Ibid. xxxiii. 27. The case is doubtful; cf. p. 61 n. 3 supra.

⁴Demosthenes xxxviii. 17.

⁵General discussion of paragraphé: Lipsius, pp. 845-65; G. M. Calhoun, "δισμαρτυρία, παραγράφη, and the Law of Archinus," CP, XIII (1916), 169-85.

⁶Demosthenes xxxiii. 27.

⁷Ibid. xxxvi. 10.

⁸Ibid. xxxiii. 3.

in the Nausimachus-Xenopeithes case,¹ release alone.²

Suspension of prothesmia.-- The various prothesmias give a limit of time within which the plaintiff must take action. What action? Is it the trial of the case? Or does the law mean that the plaintiff must enter his case before the expiration of the period? The latter is the requirement in American law,³ and logic is all in favor of the same provision in the Athenian code. The purpose of the law, after all, was to prevent sycophancy and the trumping up of cases long after the alleged offenses had taken place or debts been incurred; but the only step in the entire course of litigation which the plaintiff could take exactly when he wished was the filing of the plaint. The actual trial of that plaint might be delayed by a great many things outside his control. His opponent might set out deliberately to delay the case by the use of the many technical devices; postponements of arbitration, failure to appear at the appointed day, followed by a δίχη μὴ οὔσα; *paragraphé*, *diamartyria*, postponements before the magistrate, etc.⁴ Aside from deliberate attempts to hold up the proceedings, many other circumstances might delay a case; liturgies and trierarchies⁵ which either party might be called upon to undertake; attempts of private arbitrators to settle the matter out of court; press of cases before the juries, etc. Since the purpose of the statute was to guarantee, to a certain extent, the bona fides of the plaintiff, there would be no point in a temporal

¹Ibid. xxxviii. 1.

²Another form of exception is the *diamartyria*, which was used for the most part in inheritance cases by the direct heir. That it had other uses is shown by Lysias xxiii. 13-14, but we have no evidence that it could be used to bar a suit on the basis of the *prothesmia*.

³Cf. e.g. New York Civil Practise Act (1921), art. 2.

⁴Lex. Cant. s.v. δίχη μὴ οὔσα. ⁵Demosthenes xlvii. 50.

limitation on any action of the plaintiff except the one that does, since it is entirely within his power, indicate bona fides on his part, that is the commencement of the action.

In two passages where a five year prothesmia is mentioned, the action which is limited is referred to as δικάζεσθαι.¹ The active δικάζω, of course, is used of a magistrate presiding over a trial² or of a jury trying a case.³ But the middle is used of a litigant and usually means to "enter a suit" or "go to law."⁴ But there are examples of prothesmia where the phraseology is more certain. The prothesmia for the δίμη μὴ οὖσα was, as has been seen,⁵ ten days. In that suit the action of the plaintiff is called ἀντιλαχεῖν,⁶ which can only mean "enter a suit against," i.e. an exceptive suit. The same word is used of the action limited by the two month prothesmia in the exceptive suit to the δίμη ἔρημος.⁷ In speaking of the three day prothesmia for dikai and graphai before the Euthynos, Aristotle uses the word ἐμβαλέσθαι,⁸ which must refer exclusively to the entering of a case.

In the paragraphe brought against the sons of Nausicrates, a case arising from a guardianship question, the speaker cites the prothesmia in such cases as barring the present suit;⁹ he also mentions the fact that his father (the guardian in question) reached an agreement with the wards concerning their complaints

¹Isaeus iii. 58 and Demosthenes xxxviii. 17.

²Aristotle Ath. Pol. lii. 3 of the Eisagogeis; ibid. liii. 2 of the Forty.

³Ibid. lxiii. 3; Demosthenes xxi. 75.

⁴Ibid. lv. 31; Lysias xii. 4. ⁵p. 44 supra.

⁶Pollux viii. 60. ⁷Ibid. 61. Cf. p. 45 supra.

⁸Ath. Pol. xlviii. 4.

⁹Demosthenes xxxviii. 17. This is discussed pp. 9-12 supra.

eight years after they had reached their majority,¹ without any suggestion that there was anything illegal or even irregular in the wards' original charge. The implication is rather that the case had long been subject to litigation. Certainly if the guardian had been freed of his obligations by the prothesmia his sons would have mentioned it, especially since their own defense was based largely on the prothesmia. The only reasonable conclusion is that the claim was entered within five years, and that its legality was in no way invalidated by the fact that the case was not finally settled until eight years after the wards had reached their majority.

A second illustration consists in a comparison of two similar cases of the *graphé paranomon*. We know that the proposer of a decree or law was *ὁπεύθωνος* for one year only.² Therefore in the Leptinean oration, Leptines himself is no longer liable to prosecution since more than a year has elapsed since he proposed the law.³ True, Bathippus, the father of the present prosecutor, had indicted the law within the year, but he had died before the case came to court, and since the time had now elapsed, the present prosecutor had to indict the law *de novo*.

In an almost identical case, Aeschines indicted Ctesiphon for illegality, charging that the latter had wrongly proposed a crown for Demosthenes.⁴ Seven years elapsed before the case came to trial,⁵ and yet Ctesiphon was still *ὁπεύθωνος*.⁶ A comparison of the two cases shows that in both the proposer was correctly indicted before the year had passed; but in the Leptines case, the

¹Demosthenes xxxviii. 3, 6.

²Hypothesis 2 ad Demosthenes xx, 3. Cf. p. 25 supra.

³Demosthenes xx. 144.

⁴Aeschines iii. 12.

⁵Ibid. 219, 242, 254.

⁶Ibid. 210.

prosecutor died and the prothesmia lapsed; in the Ctesiphon case the prosecutor was still living and was prosecuting the action he commenced seven years before. There is no other explanation for Ctesiphon's remaining accountable in face of the analogy with the Leptinea.

The question might be raised why the hypomosia of Bathippus should lapse with his death in a *graphé paranomon*, whereas the episkepsis of Polyaratus in an inheritance case was valid after his death and could be prosecuted many years later by Mene-xenus.¹ The answer is that the episkepsis could be made by one person only, and at one time only, and the fortune of many might depend on that single act. The death of the person who had made the episkepsis, an accidental circumstance, would thus be the means of ruin to those in whose behalf he had acted, and they would be without recourse, for no new episkepsis could be brought. In the *graphé paranomon*, however, the only thing at stake was the punishment of the proposer of an ill-advised law. Any one could bring a hypomosia against him at any time within the year; and if one prosecutor died, another could come forward with a new hypomosia. The law could always be repealed, so no particular public interest was involved. There would never be any question of any-one losing his rights or property through the death of the initiator of a *graphé paranomon* as there would be in the case of the episkepsis.

A point on which we have no information is the question of what happened to the prothesmia if an accused person or debtor remained outside the jurisdiction of Athens until the prothesmia had elapsed. In Apollodorus vs. Timotheus we have a debtor remaining away from Athens for many years, but the case can give no

¹Isaeus v. Cf. pp. 17-19 supra.

light here because there had been no default, and therefore the prothesmia had not begun.¹ The only passage which gives any help is in Plato's discussion of usucapion in the Laws,² where the provision is made that if the possessor of a piece of property remains outside the State, there shall be no usucapion (προθεσμία) at all. It seems certain that a person would not be deprived of his right to bring action by the lapse of prothesmia if his opponent, by remaining away from Athens, had prevented him from ever suing. It is possible that the prothesmia was cumulative: that only the time the offender or debtor was in Athens was counted; it is more probable that the prothesmia ran regardless of the whereabouts of the offending or defaulting party if the would-be plaintiff had ever had any opportunity to bring suit. But there is no means of proving it one way or another.

¹Demosthenes xlix. Cf. p. 6 supra.

²954 D.

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